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S.A.No.528 of 2021

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**DATED : 23.11.2023**

**CORAM :**

**THE HONOURABLE MS.JUSTICE P.T.ASHA**

**S.A.No.528 of 2021**

**and**

**C.M.P.No.10704 of 2021**

Kalyanakumar

...Appellant

Vs.

1. Navaneethakrishnan
2. Chandra
3. Nagavalli

... Respondents

**Prayer:-** This Second Appeal has been filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 11.02.2021 passed in A.S.No.140 of 2019 on the file of the IV Additional District and Sessions Judge, Coimbatore confirming the judgment and decree dated 20.02.2019 in O,S.No.63 of 2017 on the file of the Sub Judge, Mettupalayam,.

For Appellant : Mr.E.Karthik Raja

For respondents : Mr.P.Veeraraghavan



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## **J U D G M E N T**

The unsuccessful first defendant before the Courts below has preferred the above second appeal challenging the judgment passed by the learned IV Additional District and Sessions Judge, Coimbatore in A.S.No.140 of 2019 in and by which, the learned Judge has confirmed the judgment and decree passed by the learned Subordinate Judge, Mettupalayam in O.S.No.63 of 2017.

2. The facts are briefly set out herein below and the parties are herein referred to in the same litigative status as before the trial Court.

3.The plaintiff had filed the suit for partition of the suit properties into four shares and to allot one share to him. It is the case of the plaintiff that the first defendant is his brother, the second defendant is his mother and the third defendant is his sister and they are the legal heirs of one Krishnasamy. It is the case of



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the plaintiff that the first item of the suit property belonged to Krishnasamy under a settlement deed dated 16.09.1966. The said Krishnasamy had died intestate on 08.08.2008 and on his demise, the property devolved equally on the plaintiff and the defendants herein.

4. The second defendant had remained *ex-parte* and the first defendant had filed a written statement *inter-alia* admitting the fact that the properties devolved to Krishnasamy and he had died on 08.08.2008. However, it is the contention of the first defendant that Kandasamy had executed a Will dated 06.06.2008 in and by which he had bequeathed the properties on his legal heirs. He had also raised a plea that all the properties of Kandasamy had not been included in the suit and therefore the suit is hit by partial partition. He would further submit that the Will and other documents are with one S.Rajendran from whom the father, Kandasamy had borrowed a sum of Rs.15,00,000/- in the year 2008. Therefore, he would submit that he is unable to reveal the complete details of the



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properties contained in the Will.

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5. An additional written statement thereafter came to be filed by the first defendant in which he would submit that the third item of suit property was included after he had pointed out the anomaly in his written statement. Further, he would submit that the plaintiff who is very much aware about the Will dated 06.06.2008 despite which the present suit has been filed. He would also contend that the Will makes provision in respect of all the properties. He would therefore contend that the suit has to be dismissed.

6. The third defendant has not filed any written statement.

7. The trial Court had framed the following issues.

- 1. Whether the Will dated 06.06.2008 alleged to have been executed by Krishnasamy as alleged in the statement of D1 is true and valid?*
- 2. Whether the plaintiff is having 1/4<sup>th</sup> share in*



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*the suit properties?*

3. *Whether the plaintiff is entitled to partition and  
separate possession as prayed for?*

4. *To what other reliefs?*

8. The plaintiff had examined himself as P.W1 and marked Exs. A1 to A13. On the side of the defendants, the first defendant had examined himself as D.W1 and one S.Rajendran, who is said to be creditor of their father, Krishnasamy as D.W2 and the Will was marked as Ex.B1, dated 06.06.2008.

9. The learned Judge, on considering the Will-Ex.B1, came to the conclusion that the Will is shrouded in suspicious circumstances and had also held that the witness who has attested the Will is a close associate of the first defendant and the first defendant has taken an active part in the execution of the Will. That apart, the first defendant has not produced the Will at the earliest point in



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time despite being asked to do so. Therefore, the learned Judge held that the first defendant had failed to prove the Will and therefore, the property of Kandasamy had to be divided as per Section 8 of the Hindu Succession Act. Therefore, the suit came to be decreed. Aggrieved by this judgment and decree, the first defendant had filed A.S.No.140 of 2019 on the file of the IV Additional District and Sessions Judge, Coimbatore. The learned Judge, by judgment and decree dated 11.02.2021, dismissed the appeal, confirming the judgment and decree of the trial Court. Aggrieved by this concurrent judgment and decree, the appellant before this Court.

10. The second appeal was admitted on the following substantial questions of law:

*"1. When the Will was not challenged by the party to the suit, can the Courts below suo-motu disbelieve the execution of the Will?"*



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*2. Whether the Courts below hold against the Will, when the party to the proceedings has not stated anything against the Will in pleadings and has not elucidated anything against the execution of the Will in the cross examination?*

*3. Whether the Courts below are right in holding that the execution of the Will is unbelievable only on guesses and surmises when the same has been proved as per law?*

*4. Whether the Courts below can hold against the execution of the Will, when the same was proved by the party asserting it and the party affected has not taken any steps to disprove the Will?*

*5. Whether the Courts below are right in holding that, the attesting witness is not genuine*



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*only because the attesting witness does not know  
the details the family background of the executants  
of the Will?*

11. The learned counsel for the first defendant would submit that a mere reading of Ex.B1-Will would show that the father, Kandasamy had taken into consideration everyone under the Will. He would contend that provision has been made for the wife and after her, the properties were to devolve on his two sons since according to the father, he had provided the daughter adequately at the time of her wedding. He would submit that the Will has been proved in the manner known to law as the attesting witness had been examined and has spoken about the execution. He would submit that these factors have been totally overlooked by the Court below. He would draw the attention of the Court to evidence of P.W1, in his cross examination, where he has admitted that he had omitted to include one property which had been allotted to the



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share on his father in the partition in the year 1966 and further, he has pointed out the admission of the plaintiff that he is in occupation of the first floor and in the other portion, his brother, the first defendant, was residing. He would also point out the admission of the plaintiff as P.W1 about the non filing of documents and also the non inclusion of certain properties that had been sold. The fact that the plaintiff is admitted to be in possession of the properties along with the defendants would only go to show that the desire of the testator as set out in the Will has been given effect to. He would also draw attention to the fact that the first defendant had been allotted an extra property as he has undertaken to discharge the loan which was taken from one Rajendran (the attester of the Will). He would also rely upon the statement of D.W1 wherein it is stated that in the first floor, one portion had been constructed by the plaintiff and one portion by the first defendant and that this statement has been rebutted by the plaintiff, all of which would clearly show that the Will had been given effect to.



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12. Per contra, Mr.P.Veeraraghavan, the learned counsel for the plaintiff, would submit that the first defendant's entire case revolves around the Ex.B1-Will which he has not proved in the manner known to law. The learned counsel would submit that the attesor was examined as D.W2. He would also point out the collusion between the first defendant and D.W2 is clearly evident from their evidence regarding the repayment of the loan. He would further submit that, in his chief examination, D.W2 would submit that the amount was given by the first defendant to his deceased father, who in turn had handed over the money to P.W1 there upon, D.W1 had returned the promissory note to Kandasamy, who had thereupon given it to the first defendant. However a copy of this alleged pronote has not been produced before this Court. In his cross examination, he has admitted the presence of the first defendant, the propounder of the Will at the time of the alleged execution of the Will, which would clearly show the act of law that has been taken by the first defendant. He would also concede that



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the first defendant had not produced the Will despite repeated requests and directions from the Court and has produced it much later. The plaintiff has not sought any relief challenging the Will. He would therefore pray that the second appeal be dismissed and the judgment and decree of the Courts below be confirmed.

13. Heard the learned counsel on either side and perused the materials available on record.

14. The suit revolves around the Will-Ex.B1. If the first defendant is able to establish the genuineness of Ex.B1, then the property is not available for partition. However, if Ex.B1 is proved to be a false document, then the partition has to be effected. The first defendant has put across Ex.B1-Will dated 06.06.2008 claiming the same to have been executed by the deceased Krishnasamy. A reading of recitals of the Will would indicate that the provision has been made for the wife to only enjoy the properties till her life time. Thereafter, it was to devolve upon the



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sons namely, the plaintiff and the first defendant. The first defendant was to get an extra property since he had undertaken to discharge the loan taken by his father Krishnasamy from one S.Rajendran, who was examined as D.W2.

15. A reading of the judgment of the Courts below would show that the first defendant who has mentioned the Will in his original written statement has not been produced the same at the earliest point in time to the other sharers. The Will is an unregistered document. In the first instance, the first defendant would submit that the Will and other details are with Rejendran/D.W2 Thereafter, the plaintiff has amended the suit and an additional written statement came to filed. Even in the additional written statement, the first defendant has not produced the Will. The Will has not been produced till the oral examination had commenced and it was only on 13.12.2018, during the cross examination that the first defendant had produced the Will. The



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suit was filed in the year 2013 and the Will came to be filed only on 13.12.2018. The Courts below have also taken note of the proximity between the date of death and the execution of Ex.B1-Will. D.W2 has been examined stating that he is the close family friend. D.W1 claims to have known his family over 20 years. However, he is not able to give any details about the ailments of the family members collectively. Therefore, the Courts have taken note all these factors and held that the Will is not proved. Another factor which has to be taken note of is that the first defendant has pleaded that the amount due by his father to D.W2 had been discharged and D.W2 would submit that the promissory note had been handed over back to the first defendant. However, the first defendant has not chosen to file this document (pronote) into Court, which once again establishes the collusive pleadings of parties. Once the Will is not proved in the manner known to law, then the property has to devolve upon all the legal heirs as per the provisions of Section 8 of the Hindu Succession Act, whereby each would get a 1/4<sup>th</sup> share in the properties. The Courts below are bound to consider the veracity of



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the Will even if there is no serious challenge to date as it is the bounden duty of the Court to ensure the provisions of Section 63(c) of the Indian Succession Act and Section 68 of the Indian Evidence Act are scrupulously complied with. The Courts are bound to sit in the arm chair of the testator while deciding upon a Will which is put forward by one of the parties to the proceeding. The Courts below have listed out the suspicious circumstances surrounding the execution of the Will and this Court cannot ignore these findings. Therefore, the substantial questions of law are held against the appellant/first defendant. Accordingly, the second appeal is dismissed. The judgment and decree of the Courts below stand confirmed. No costs. Consequently, connected miscellaneous petition is closed.

**23.11.2023**

Index :Yes/No

Internet:Yes/No

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To



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1. The IV Additional District and Sessions Judge, Coimbatore
2. The Sub Judge, Mettupalayam.
3. The Section Officer, V.R.Section, Section, High Court.

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**P.T.ASHA.J**

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