



C.M.S.A.No.46 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.08.2023

CORAM :

THE HON'BLE MR. JUSTICE P.VELMURUGAN

C.M.S.A.No.46 of 2021

and

C.M.P.No.7615 of 2021

K.Sakthivel

... Appellant

Vs.

1.Pappathi

Krishnasamy (Died)
Rangathal (Died)

2.Kalaiselvan

3.Neelavathi

4.Kamalavathi

5.Krishnamoorthy

... Respondents

Civil Miscellaneous Second Appeal filed under Order 21 Rule 97 r/w under Section 100 of Civil Procedure Code to set aside the fair and decreetal order made in C.M.A.No.12 of 2016, dated 18.02.2020 on the file of the First Additional Sub Court, Erode, Erode District reversing the order and decretal order passed in E.A.No.109 of 2013 in E.P.No.31 of 2010 in



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O.S.No.277 of 1996 dated 22.04.2016 on the file of the Principal District Munsif, Erode, Erode District.

For Appellant : Mr.C.Prakasam
For Respondents : Mr.M.Karthik
for R1
No appearance
for R2, R3 and R5
R4 – Notice not served
(No such addressee)

J U D G M E N T

This appeal has been filed against the judgment dated 18.02.2020 passed in C.M.A.No.12 of 2016 by the learned First Additional Sub Judge, Erode, Erode District, reversing the order passed in E.A.No.109 of 2013 in E.P.No.31 of 2010 in O.S.No.277 of 1996 dated 22.04.2016 on the file of the Principal District Munsif, Erode, Erode District.

2. The brief facts of the case are as follows :

(i) Originally, the petition mentioned property i.e. the agricultural lands situated in R.S.No.135/1 old S.F.No.1101, 1103-A ad-measuring 69-1/4 cents in Avalpoondurai Village belonged to one Sathasiva



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Gounder under a registered partition deed dated 06.10.1961.

The said Sathasiva Gounder had one son and two daughters, namely Krishnasamy Gounder, Pappathi and Rangathal, who are the respondents herein. The said Krishnasamy and his son and daughter had sold an extent of 069-1/4 cents acres in favour of Karuppana Chettiar, who is the father of the appellant herein under a registered Sale Deed dated 25.05.1994.

(ii) The said Karuppana Chettiar had two sons viz., the appellant (Sakthivel) and one Mani. After the demise of Karuppana Chettiar, the appellant herein as a plaintiff, had filed a suit for partition and separate possession against his brother one Mani in O.S.No.453 of 2004 on the file of the Principal Subordinate Court, Erode. Pending suit, a compromise had been arrived at between the appellant and his brother, under the compromise final decree dated 25.1.2005 and the petition mentioned property as 4th item of the properties, was allotted to the appellant and he took possession and he was in enjoyment of the property as absolute owner. In the meanwhile, without impleading the appellant's father as a party, the first respondent herein (Pappathi) had filed a suit in O.S.No.436 of 1994 on the file of the Subordinate Court, Erode for partition



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and separate possession of the properties left by Sathasiva Gounder against Krishnasamy and the deceased Rangathal. The said Suit was re-numbered as O.S.No.277 of 1996. Pending suit, Rangathal died and her legal heirs are brought on record. The said suit is a collusive and fraudulent one and the respondents never contested the same and an *ex-parte* preliminary decree was passed on 12.1.1998 and final decree was also passed on 01.08.2001. However, the same would not bind the appellant, who is the third party to the suit. Ever since the date of purchase i.e. 25.05.1994, Karuppana Chettiar and the appellant herein have been in possession and enjoyment of the petition mentioned property. The suit in question had been filed one month after the sale mentioned above. The said Sathasiva Gounder executed a registered a Will on 02.05.1989 in a sound and disposing state of mind in favour of his son Krishnasamy. Therefore, the said Will is the last testament of the testator and the same clearly proves the title of the respondents Krishnasamy, Rangathal and the respondents 2 to 5 herein. Based on the Will, the said Krishnasamy and his son and daughter sold the petition mentioned property in favour of Karuppana Chettiar. Hence, the first respondent (Pappathi) has no right to claim any share, whatsoever in the



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petition mentioned property. After obtaining the *ex-parte* decree, the first respondent filed E.P.No.31 of 2010 for delivery of possession of the share allotted to her. Therefore, the appellant/third party filed an application in E.A.No.109 of 2013 in E.P.No.31 of 2010 before the learned Principal District Munsif, Erode under Order XXI Rule 97 and Section 151 C.P.C to record his obstruction for delivery of possession of the petition mentioned property to the first respondent herein. The Execution Court considered the factual aspects and allowed the application. Challenging the same, the first respondent herein filed C.M.A.No.12 of 2016 and the lower appellate Court and reversed the order of the Execution Court and allowed the appeal on 18.02.2020. Aggrieved by the said judgment, the appellant has come forward with the present second appeal.

3. The learned counsel for the appellant submitted that the petition mentioned property devolved upon Sathasiva Gounder under a registered partition deed dated 06.10.1961. The appellant's vendor Krishnasamy got the right and title over the petition mentioned property through a registered Will dated 02.05.1989, which was executed by his



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father Sathasiva Gounder. Based on the Will dated 02.05.1989, Krishnasamy and his son and daughter sold the petition mentioned property in favour of the appellant's father Karuppana Chettiar through a registered sale deed dated 25.05.1994, ever since, the appellant's father and the appellant had right and title over the property and he is in possession and enjoyment of the said property. However, the first respondent, who is the sister of Krishnasamy, suppressing those facts, has filed a suit in O.S.No.436 of 1994 (re-numbered as O.S.No.277 of 1996) for partition against his brother, as if her father died intestate and obtained the *ex-parte* decree. Challenging the same, the second respondent herein filed a petition to set aside the *ex-parte* decree and the same was dismissed. Against the said order, the second respondent herein preferred C.R.P.Sr.No.35260 of 2001 before this Court with a petition to condone the huge delay in re-presenting the petition to set aside the *ex-parte* decree along with the written statement and the same dismissed.

4. The learned counsel for the appellant further submitted that the respondents have admitted the Will. The first respondent is fully aware



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that the appellant's father and appellant are in possession of enjoyment of the said property and without even obtaining Encumbrance Certificate, the first respondent filed the suit and obtained *ex-parte* decree and also filed execution petition. Therefore, the appellant has filed obstruction petition and the same was allowed by stating that Will executed by the father of the vendor is a genuine one and the appellant is the *bona-fide* purchaser. Whereas the first appellate Court allowed the appeal stating that Will is not a genuine one and it is not proved by the appellant by bringing the attesting witnesses and since the attesting witnesses are no more and a son of one of the attesting witnesses deposed that he identified the signature found in the Will, as one of the witnesses is belonging to his father, which needs interference by this Court.

5. The learned counsel for the first respondent submitted that the first respondent never admitted the Will. She came to know about the Will only after purchase of the petition mentioned property. Further, the alleged Will dated 02.05.1989 is not true, valid and genuine and it is a fabricated one. He further submitted that Will is not a deed of transfer, it interferes with the normal succession, unless and otherwise a Will is proved



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and declared to be true and valid, no right and title could be claimed under the Will. Therefore, unless the genuineness of the Will and vendor's title is proved, the appellant could never get title over the petition mentioned property.

6. Heard the learned counsel for the appellant and the learned counsel for the first respondent and also perused the records.

7. Despite service of notice, respondents 2, 3 and 5 have not chosen to enter appearance either through counsel or in person.

8. Admittedly, the first respondent filed the suit for partition and preliminary decree and final decree was also obtained. In order to take possession, the first respondent filed execution petition in E.P.No.31 of 2010 and pending execution petition, the appellant herein filed E.A.No.109 of 2013 seeking to record his obstruction under Order XXI Rules 97 to 101 and Section 151 C.P.C and the same was allowed by the Execution Court and challenging the same, the first respondent filed C.M.A.No.12 of 2016 and the same was allowed by the first appellate Court.



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9. It is settled principle of law that while admitting the second appeal, the Court may formulate substantial question of law. In the case on hand, the present appeal is pending from the year 2021 at the admission stage, itself.

10. The appellant is claiming title through the registered sale deed dated 25.5.1994. Under the Will executed by the father of the appellant's vendor, the vendor got title over the property and that the vendor sold the petition mentioned property to the appellant's father. Based on that, the appellant got title over the said property. Before the Execution Court in E.A.No.109 of 2013, during the trial, the evidence was let in and the said Will was marked before the Court under Ex.P7, which shows that the Will is dated as 25.6.1989, however, it was mentioned as 02.05.1989. Since both the attestors of the Will are no more, one of the attestor's son viz., Balakrishnan S/o.Subburathinam was examined as P.W.4 and he has stated that he has identified the signature of his father Subburathinam, which itself clearly shows that P.W.4 has not identified the signature of the testator and he has identified only the signature of the attestor. Though the Will has to



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be proved duly as contemplated under Section 68 of Indian Evidence Act, 1872, at least the Will has to be proved by one of the attestors as per Section 69 of the Indian Evidence Act, 1872, which reads as follows :

" Section 68 of the Indian Evidence Act, 1872:

Proof of execution of document required by law to be attested. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Section 69 of the Indian Evidence Act, 1872 :

Proof where no attesting witness found. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person".

11. However, in the case on hand, both the attestors of the Will are no more and one of the attestors's son was examined as P.W.4 and he identified his father's signature, but, he has not spoken about the handwriting and signature of the testator Sathasiva gounder. The Execution



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Court has come to the conclusion that Will was proved under Section 69 of Indian Evidence Act, 1872, since both the attestors are not alive and it was sufficient to identify the signature of the attestors, P.W.4 who is the son of one of the attestors identifies the signature of the attestor. However, the first appellate Court rightly appreciated the entire evidence and found that admittedly, in this case, Will was not proved under Section 68 of the Indian Evidence Act and the reason that at the time of examining the witnesses in E.A.No.109 of 2013 in E.P.No.31 of 2010, both the attestors are no more, however, they tried to prove the same under Section 69 of the Indian Evidence Act, 1872. Therefore, the evidence of the witness P.W.4 clearly shows that he had only identified the signature of his father, who was one of the attestors of the disputed Will. However, he has not identified the signature or handwriting of the testator. If a person, is examined as a witness and if he identified the signature of the attesting witness in that Will, then it cannot be stated that the Will is proved based on his evidence.

12. This Court, as an appellate Court, re-appreciated the entire materials and finds that Will was not proved in the manner known to law



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and also this Court does not find any perversity in the findings given by the lower appellate Court. This Civil Miscellaneous Second Appeal is dismissed, accordingly. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

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Index: Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation Case : Yes/No
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Note:

This appeal is filed in the year 2021 and the same is pending without formulating any substantial question of law. It is shocking to note that CMSA should be admitted on the ground of the substantial questions of law mentioned in the grounds of appeal. Once the Court is satisfied with the averments made in the petition, the Court has to formulate the substantial question of law and admit the appeal and call for records from the Courts below. Unfortunately, this appeal is pending from the year 2021 and so far, no substantial question of law is formulated and the appeal is pending at the admission stage, itself. It is not the first case, most of the cases are pending for more than 30 years, for admission stage. The Registry is directed to place a note before the Hon'ble The Chief Justice for taking



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effective steps that hereinafter no appeal should be pending even without
formulating substantial questions of law.

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To

1. The First Additional Sub Court,
Erode, Erode District.
2. The Principal District Munsif,
Erode, Erode District.



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P.VELMURUGAN, J.

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