



A.S.(MD)No.201 of 2010

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 15.06.2023

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.(MD)No.201 of 2010

Vijaya

... Appellant / Plaintiff

Vs.

1.Nallaperumal (Died)

2.K.Gomathi (Died)

3.K.Padmavathi

4.K.Sarojini (Died)

5.R.Alamelu

6.Selvi.Sooriya Padma

7.Lenina

(R7 is brought on record as LR of the deceased
R4 vide Court order dated 02.01.2020 in C.M.P.
(MD)Nos.12301, 12331 & 12332 of 2019)

8.Thangam

9.T.S.Sankaralingam

10.N.Gomathi

11.N.Subbulakshmi

(Respondents 8 to 11 are brought on record as LR of
R1 vide Court order dated 02.01.2020 in
C.M.P.(MD)Nos.12333 to 12335/2019)



A.S.(MD)No.201 of 2010

12.K.Ravisankar

13.K.Ramsankar

(Respondents 12 and 13 are brought on record as LRS of the deceased 2nd respondent vide Court order dated 26.04.2023 in C.M.P.(MD)Nos.973, 975 & 976/2023)

... Respondents / Defendants

PRAYER: Appeal Suit filed under Section 96 of C.P.C., 1908 against the judgment and decree dated 26.03.2010 made in O.S.No.61 of 2006 on the file of 1st Additional District Court, Tirunelveli.

For Appellant	: Mr.H.Arumugam for Mr.B.Jameel Arasu
For Respondents	: Mr.V.Selvakumar for R3 & R7 Mr.Ananth C.Rajesh for R8 to R11 Mr.P.Ponkarthikeyan for R5 & R12 R1, R2 & R4 Died (vide EB) R6 – Dismissed vide Court order dated 20.08.2015. R13 – Batta due

JUDGMENT

Aggrieved over the dismissal of the suit filed for partition and separate possession, the present Appeal Suit came to be filed.

2. For the sake of convenience, the parties are referred to herein, as per their own ranking before the trial Court.



A.S.(MD)No.201 of 2010

3. The brief facts leading to the filing of this Appeal Suit are as follows:

The plaintiff and the defendants are sisters and brothers. First defendant is the brother and other defendants are sisters of the plaintiff. The suit property owned by their mother Subbuthaiammal, by virtue of a sale deed on 25.03.1957. The said Subbuthaiammal, mother of the parties died intestate in the year 1971. The plaintiff has already filed a suit for partition against the defendants and the children of the first wife of his father in O.S.No.104 of 2006. After that suit, the first defendant is acting adverse to the plaintiff. Therefore, the plaintiff has sought for partition. However, the defendant has not agreed for the same. Hence, the suit.

4. In the reply statement, it is the stand of the plaintiff that the Will dated 25.02.1971, said to have been executed by his mother, is false and the Will has been created by the first defendant and his father, after the death of the mother and therefore, the same is a result of rank forgery. She has also denied that first defendant is in open, continuous and exclusive and hostile possession of the suit properties.



A.S.(MD)No.201 of 2010

WEB COPY

5. First defendant has filed a written statement admitting that the suit property belonged to his mother. It is his contention that while in sound disposing state of mind, his mother has executed a unregistered Will on 25.02.1971, reserving the life interest to her husband and vested remainder to the defendant after his father. The Will covers house properties and also certain debts. The said Will was attested by his father and the defendants 2 and 4. The first defendant got his sisters married. He provided jewels and vessels and other provisions as per local custom apart from handing over the jewels mentioned in the Will.

6. It is the case of the first defendant that the plaintiff is aware of the existence of the Will executed by her mother and the Will came into effect after the death of the mother in the year 1971. The defendant has been in open, continuous, exclusive and even hostile possession of the schedule properties to the exclusion of all including the plaintiff from the year 1975, after the demise of his father. He has perfected title to the properties by adverse possession also. The suit has been filed after 36 years after the death of her mother and 32 years after the demise of her father. It is the further case of the first defendant that all the taxes have been paid by the first defendant from the inception and house tax was also assessed in



A.S.(MD)No.201 of 2010

the name of the first defendant and lot of improvements have also been made by him.

7. In the additional written statement, it is the stand of the first defendant that 6th defendant was all along under the care and custody of the first defendant and she had also relinquished her share to the first defendant. According to him, he is entitled to the property as per the last Will executed by his mother.

8. The Defendants 3 and 5 have filed a written statement denying the Will and submitted that no will was executed by their mother. The mother was not in sound state of mind during her last days. The signature found in the Will is also not that of the mother. Hence, they are also entitled to share in the suit property.

9. Based on the above pleadings, the trial Court has framed the following issues:

“1. Whether the mother of the parties had executed a Will dated 25.02.1971?

2. Whether the plaintiff and the defendants 3 and 5 are entitled to the relief sought?

3. To what other relief, the parties are entitled to?”



A.S.(MD)No.201 of 2010

10. Before the trial Court, on the side of the plaintiff one witness was examined as P.W.1 and one document was marked as Ex.A1. On the side of the defendants, three witnesses were examined as D.W.1 to D.W.3 and 15 documents were marked as Ex.B1 to Ex.B15.

11. Based on the evidence and materials placed on record, the trial Court dismissed the suit filed by the plaintiff for partition. Challenging the same, the present Appeal Suit came to be filed by the unsuccessful plaintiff.

12. The learned counsel appearing for the plaintiff / appellant submitted that the suit property originally belonged to the mother of the plaintiff and defendants. Though the plaintiff originally claimed 1/7th share, after the death of 6th defendant, she sought 1/6th share by amending the plaint. According to him, these facts are not disputed. The first defendant, who is the brother of the plaintiff has propounded the Will dated 25.02.1971. According to him, the said Will has been created after the death of the mother and father and non-suited the other shares. The Will said to have been attested by the father of the parties and defendant Nos. 2 and 4. Whereas, in the written statement, the defendant Nos.5 and 6 disputed the Will. D.W.2 was examined on the side of the defendant though he is not an attesting witnesses.



A.S.(MD)No.201 of 2010

13. Further, it is the submission of the learned counsel appearing for the plaintiff / appellant that the unregistered Will slated with serious suspicious circumstances, which has not been dispelled. The evidence of the parties, including the evidence of P.W.1 and P.W.3 makes it clear that on the date of alleged Will, a mortgage deed also executed in favour of the executrix / testatrix. Therefore, executing the Will, at the same time when the mortgage deed was registered, is highly improbable. Further, before executing the mortgage deed, the details of the said mortgage found in the Will itself creates serious doubt about the Will. Further, D.W.2, is not an attesting witnesses and his evidence is also contradict to the evidence of D.W.1 and D.W.3. Whereas D.W.3 is one of the attesting witnesses and she was examined after the evidence was closed on the side of the defendants and before the judgment. The conduct of examining D.W.3, on later point of time, creates serious doubt about the very Will.

14. Further, it is the contention of the learned counsel appearing for the plaintiff / appellant that in the Will there was no mention about the daughter and no provision was made in favour of the daughters, which is also one of the suspicious circumstances attached to the Will. When there is suspicious circumstances in the Will, such Will cannot be given much importance. The Trial



A.S.(MD)No.201 of 2010

Court has simply rejected the plaintiff's case by accepting the Will. It is also to be noted that some of the daughters also residing with the first defendant in the same house. Therefore, claiming partition, immediately after the death of his mother also does not arise at all. Therefore, mere delay in filing the suit, the trial Court cannot non-suit the plaintiff. The attesting witness ought to have been examined before other witnesses examined. Whereas, the Will has been marked through D.W.1, which is also not according to law. In support of his submission, he relied upon the judgment of the Bombay High Court in **Walter D'Souza Vs. Anitha D' Souza and others** reported in **2016 (1)MWN (Civil) 440**.

15. The learned counsel appearing for the defendants / respondents would submit that the mother of the parties died in the year 1971 and before that, while she was not in sound disposing state of mind, executed the Will. The Will has been attested by father of the parties and D.W.3, who is one of the sisters of the plaintiff. Her evidence has been clearly established that the Will has been executed by the mother and no suspicious circumstances whatsoever has been brought on record. Admittedly, some of the sisters were married after the death of the parents. Only the first defendant has made all the marriage expenses of his sisters. When the first defendant was taking care of all the sisters, even during the



A.S.(MD)No.201 of 2010

life time of the parents, merely no provision has been made in the Will in favour of the daughter that cannot be a suspicious circumstances.

16. Further, the learned counsel appearing for the defendants / respondent would submit that the suit has been filed after 36 years and no notice whatsoever has been sent for claiming partition. Further, all the taxes have been paid by the first defendant. This fact clearly shows that the plaintiff is aware of the existence of the Will left by her mother. Therefore, the trial Court has rightly considered the entire evidence and dismissed the suit and therefore, the judgment of the trial Court does not warrant interference.

17. In the light of the above submissions, now the point arise for consideration in this Appeal Suit are as follows:

1. Whether the Will dated 25.02.1971 is true and valid and proved in the manner known to law?
2. Is there any suspicious circumstances brought on record?
3. Is it true that the propounder has not dispelled the suspicious circumstances?
4. Whether the plaintiff is entitled to the relief of partition as prayed for?



A.S.(MD)No.201 of 2010

Points:

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18. The relationship of the parties has not been disputed. Properties was originally owned by the mother of the parties to the suit. The 6th defendant, who is a unmarried daughter was also residing in the same house, which has not been disputed. The plaintiff has filed a suit for partition claiming 1/7th share in the suit schedule of property. After the death of the 6th defendant, the plaintiff claiming 1/6th share in the suit property by amending the plaint. It is the specific case of the plaintiff that his mother has died intestate. Therefore, she is entitled to partition and according to her, she has filed another suit in respect of his father's share because of the suit, the first defendant refused to give her share. Hence, the plaintiff has filed her suit. In her pleadings in the plaint, she has clearly stated that she has filed a suit in O.S.No.104 of 2006 for partition in respect of the other properties. Only, thereafter, the suit came to be filed by her. It is the specific contention of the first defendant that his mother has executed a Will, while she was in sound disposing state of mind and the same was attested by his father and other sisters and relatives. It is well settled that the initial burden lies on the propounder not only to prove the Will in the manner known to law, but also dispel any of the suspicious circumstances attached to the Will.



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19. On a perusal of Ex.B1, dated 25.02.1971, it is seen that the said Will is a handwritten Will, written by one Sankaralingam Pillai. The Will has been attested by the husband of the executrix viz., Sankaralingam and defendant Nos.2 and 4 viz., Gomathi and Sarojini respectively and another person. There are four attesting witnesses in the Will. The Will has been executed in favour of the first defendant in respect of the house property along with certain debts. It is stated in the Will that one Andal Ammal has also executed the mortgage deed dated 25.02.1971, on the same date, when the Will was executed.

20. To prove the Will, D.W.2 and D.W.3 was examined, though D.W.2 was not an attesting witness to the document. In his evidence, he has stated that the Will was executed in his presence in the house, since he is relative to the parties and Will was drafted by one Sankaralingam Pillai, who is a retired Sarishtadar of the Sub Court. He has also deposed in his evidence that the Will was signed by the executrix after understanding the contents etc. D.W.3, who is defendant No.4 in the suit, in her evidence has clearly stated that the Will was executed by her mother in the presence of his son-in-law, father and another sister and she has also signed in the Will as attesting witness. The witnesses also seen the testatrix



A.S.(MD)No.201 of 2010

signing. Her mother also seen the other attesting witnesses signing as witness.

During cross-examination, she has stated that she could not attend the Court during the trial at the initial stage, since she was not well. Her evidence clearly shows that in the Will her mother has affixed four signatures altogether.

21. On a perusal of the entire evidence of attesting witnesses, it is seen that no suspicious or other circumstances to suspect the Will was brought on record. Therefore, when the execution and the attestation of the Will also is spoken by one of the attesting witnesses, it has to be held that the Will has been validly proved in the absence of any other circumstances. No suspicious circumstances brought on record except contending that on the same day, the mortgage has also been executed. This Court is of the view that mere inclusion of the said mortgage in the Will is cannot be a suspicious circumstances for the simple reason that it is not established whether any registered mortgage was executed in favour of the testatrix on that day by any third partly, which has been referred in the Will as 'B' schedule. It is a common practice in the villages that an unregistered document are to be executed in respect of the mortgages. Therefore, merely because, the Will refers one such mortgage said to have been executed on the same day in favour of the testatrix, that cannot be a ground to doubt the genuineness of the



Will.

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22. In the entire pleadings in the plaint, the plaintiff has not stated anything about the so called Will and only in the reply statement, it is stated that the Will has been created by the father and the first defendant and it is only a rank forgery. In the reply statement, it is the case of the plaintiff that her mother was indisposed and was not having sufficient mental faculty to take a rational decision. When the witnesses clearly spoken about the mental condition and sound mind of the mother of the parties at the time of execution of the document, in the absence of any contra evidence to show that the testatrix did not possess sound mind or totally incapacitated to take rational decision, the mere oral submission of the plaintiff is not sufficient to reject the Will when the same has been proved in a manner known to law. In the chief examination, except stating that Will has been created, mental condition of the mother has not been disputed by the plaintiff and she has also admitted that except her mother has some Thyroid issue, she has no other health issues. In the cross examination, she has admitted the above facts.

23. Therefore, when the plaintiff herself categorically admitted that her mother did not have any health issues at the relevant point of time and all the family members including his father and two of the sisters have attested the Will, it



A.S.(MD)No.201 of 2010

cannot be said that the Will shrouded by serious suspicious circumstances.

Though no provision whatsoever has been made in respect of the daughters in the Will, it is relevant to note that the plaintiff has married in the year 1983, after the death of her father and mother. Further, she was residing with the first defendant and she has also admitted that only the first defendant has conducted her marriage and also gave 25 sovereign of gold jewelry and Rs.20,000/- in cash at the time of her marriage. Further, defendant No.6 was the younger daughter, she is residing with the first defendant and she was also taken care of by the first defendant and all other elder daughters have already been married. Therefore, merely because no provision has been made in the Will with regard to the daughters that cannot be ground to disbelieve the Will.

24. It is the main contention of the learned counsel appearing for the plaintiff / appellant that D.W.3, who is the one of the attesting witnesses was examined after the evidence on the side of the defendants was closed and she was examined only on 24.02.2010 before the judgment and therefore, the very purpose of right to begin as per Order 18 Rule 1 of C.P.C. has been defeated. Further, she has not filed any written statement. Therefore, it is the contention of the learned counsel appearing for the plaintiff / appellant that parties to the suit has to be



A.S.(MD)No.201 of 2010

examined first, if they chooses before examining any other witness. According to this case, D.W.2 is not a party to the suit and he was examined first and later, fourth defendant was allowed to examin without any application under Order 18 Rule 3-A of C.P.C. Therefore, it is a procedure violation. Such view of the matter, her evidence cannot be relied upon.

25. In the judgment relied upon by the learned counsel appearing for the plaintiff /appellant in *Walter D' Souza Vs. Anita D'Souza and others* reported in **2016(1) MWN (Civil) 440**, the Bombay High Court, in a proceeding relating to the Will, Probate and Letters of Administration, has held that evidence of attesting witness must always be led first in contested Probate proceedings and Executor of Will can adduce evidence after examination of attesting witness. The execution of the Will must be proved before propounder of Will is examined.

26. This Court is of the view that though the execution of the Will has to be proved first, the mere filing document by the propounder of the Will itself is not amount to the proof of the Will. Therefore, merely the procedure violation in examining the witnesses, the same will not take away the substantive right of the parties in proving the document. Though D.W.3 was examined at later point of



A.S.(MD)No.201 of 2010

time, the fact remains that she was one of the attesting witnesses in the Will. The Will has already been came before the Court and it was also pleaded in the written statement. Therefore, mere non-examination of the attesting witnesses at the first instance is not a ground to disbelieve her entire evidence. No doubt Order 18 Rule 3-A contemplates that a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage.

27. The above provision makes it clear that before any other witness on behalf of the party to be examined by the Court, the leave of the Court is required. Such procedure aspect cannot be held to be a mandatory. Therefore, this Court is of the view that merely because the attesting witness was examined after D.W.2, that will not affect the case of the defendants.

28. Considering the above, when the Will has been specifically established as per law and the attesting witness has also been examined and execution and attestation is proved and, no inherent suspicious circumstances exist. The plaintiff cannot claim any right in the property. Further, the plaintiff has married in the



A.S.(MD)No.201 of 2010

year 1983, she is residing away from the suit property and the suit has been laid after 32 years after the death of her father. Therefore, this Court is of the view that the plaintiff is not certainly entitled to any relief. The trial Court has rightly appreciated the entire evidence and dismissed the suit. In the absence of any other circumstances to disbelieve the Will, the contention of the learned counsel appearing for the plaintiff / appellant that Will has been created, cannot be countenanced. Though the plaintiff has taken a plea that the Will is a result of rank forgery, no steps whatsoever has been taken by her to prove the plea of forgery, despite the factum of execution and attestation has been established. Accordingly, all the points are answered. Such view of the matter, I do not find any merit in this Appeal Suit.

29. In the result, this Appeal Suit is dismissed and the decree and judgment of the 1st Additional District Court, Tirunelveli, dated 26.03.2010 made in O.S.No. 61 of 2006 is confirmed. No costs.

15.06.2023

NCC : Yes /No
Index : Yes/No
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A.S.(MD)No.201 of 2010

N.SATHISH KUMAR, J.

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To

- 1.The 1st Additional District Court,
Tirunelveli.
- 2.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

Judgment in
A.S.(MD)No.201 of 2010

15.06.2023