



S.A(MDNo.747 of 2016

WEB COPY **BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

DATED: 28.02.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)No.747 of 2016

P.Chandrasekar

...Appellant

-Vs-

1.P.Ganesa Subramanian

2.P.Selvaraj

3.P.Vijayarani

4.P.P.Baskaran

... Respondents

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree passed in A.S.No.21 of 2013 dated 06.04.2016 on the file of II Additional District Court, Thoothukudi, confirming the judgment and decree passed in O.S.No.203 of 2008 dated 25.04.2013 on the file of the Subordinate Court, Tuticorin.

For Appellant : Mr.S.C.Herold Singh

For Respondents : No appearance



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JUDGMENT

The plaintiff in the suit is the appellant. He filed a suit for partition of his 1/4th share. The suit was dismissed by the trial Court and the findings of the trial Court were affirmed by the first appellate Court. Therefore, the unsuccessful plaintiff is before this Court.

2. According to the appellant/plaintiff, the suit items I and II belonged to his father late Pitchiah. The said Pitchiah died leaving behind the appellant and the respondents as his legal heirs. It was averred by the appellant that said Pitchiah executed a registered Will dated 24.01.2005 bequeathing the suit property to the appellant, respondents 1, 2 and 4 excluding his daughter, third respondent as she was provided with jewels at the time of her marriage. Thereafter, the fourth respondent herein by employing undue influence on Pitchiah, got another Will executed on 05.04.2007, marked as Ex.B9. As per the said Will, the first item of the suit property was absolutely bequeathed to the fourth respondent and the second item of the suit property was given to the appellant and fourth respondent equally. After acquiring the knowledge about the



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trick played by the fourth respondent, the said Pitchiah executed another Will on 14.08.2007 marked as Ex.A.15, cancelling the earlier Will. As per the last Will executed by him, the suit item I was bequeathed to all the four sons equally. The suit item 2 was bequeathed to all the sons equally with an obligation to maintain a family temple. On these pleadings, the appellant/plaintiff prayed for 1/4th share in the suit property along with respondents 1, 2 and 4 as per the last Will of Pitchiah.

3. The respondents 1 to 3 remained *ex parte* and the fourth respondent alone filed a written statement and contested the suit. The fourth respondent in his written statement denied the averment made by the appellant as if the Will dated 05.04.2007 was obtained by him by employing undue influence on his father. The subsequent Will relied on by the appellant dated 14.08.2007 was specifically denied by the fourth respondent. It was further averred that after the death of Pitchiah, on 19.09.2007, the Will dated 05.04.2007 came into effect and consequently, the fourth respondent entitled to absolute title over the first item of the suit property. Both the appellant and the fourth respondent entitled to equal share in the second item of the suit property. It was alleged that the first respondent and his wife were looking after Pitchiah, when he fell ill. It was also



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contended that the fourth respondent was not economically well off and that was the reason why, his father wanted to give first item of the suit property in favour of the fourth respondent absolutely. On these pleadings, the fourth respondent sought for dismissal of the suit.

4. The trial Court, on appreciation of oral and documentary evidence available on record, came to a conclusion that Ex.B9, Will, dated 05.04.2007 was true and valid one and the subsequent Will pleaded by the appellant, namely Ex.A15 dated 14.08.2007 was not proved and hence, dismissed the suit. Aggrieved by the same, the appellant herein filed an appeal in A.S.No.21 of 2013 on the file of the II Additional District Court, Tuticorin. The first appellate Court also confirmed the findings of the trial Court and dismissed the first appeal. Hence, the appellant is before this Court.

5. Heard the arguments of the learned counsel for the appellant. Though the respondents served and counsel entered on behalf of the respondents, there is no representation for the respondents on 24.02.2023. Today also, when the case is taken up for hearing, there is no representation for the respondents.



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6. This Court framed the following substantial question of law, which arises for consideration in this case:-

“Whether the Courts below are justified in law in dismissing the suit for partition filed by the appellant in respect of item-II of the suit properties after upholding Ex.B9 Will?”

7. The learned counsel for the appellant by taking this Court to the evidence of attesor to Ex.A.15, Will submitted that the evidence of P.W.2 attesor proves the due execution of the Will and the Courts below ought not to have rejected the evidence of attesor to the Will. The learned counsel further submitted that the Courts below went wrong in rejecting the Will Ex.A15 on the ground that the same is unregistered one. It is the contention of the learned counsel that there is no bar for cancelling a registered Will by unregistered Will and therefore, the Courts below ought not to have non-suited the appellant on the ground that Ex.A15, Will relied on by him is unregistered one. The learned Counsel further submitted that even assuming that the appellant failed to prove Ex.A15 Will relied on by him, the Courts below, having come to a conclusion that Ex.B9 relied on by



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the fourth respondent dated 05.04.2007 was proved, ought to have granted decree for partition in respect of Item-II of the suit property.

8. The learned counsel for the appellant tried to assail the findings of the Courts below with regard to rejection of the Will relied on by him, namely, Ex.A15 dated 14.08.2007, by contending that the appellant proved the said Will by examining one of the attestors to Ex.A15 Will, as P.W.2, there are suspicious circumstances surrounding the execution of Ex.A15 Will. Even as per the admitted case of appellant, the father of the parties executed a registered Will on 24.01.2005 and subsequently cancelled the same and executed another registered Will on 05.04.2007, which was marked as Ex.B9. However, the Will relied on by the appellant Ex.A15 is an unregistered one. Though registration of the Will is not compulsory, when the testator executed two Wills earlier and got it registered, the appellant has not shown any reason for non-registration of the third Will relied on by him, namely, Ex.A15. The claim of the appellant that the testator, who executed a registered Will Ex.B9 and cancelled the same by way of unregistered Will, does not appear natural in the facts and circumstances of the case. Further, the Courts below after considering the evidence available on record



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came to a factual conclusion that the father of the parties lived along with the fourth respondent during his last days and the fourth respondent had no business of his own. Since the fourth respondent was not economically well off, the father of the parties decided to give the first item of the suit property, namely, a house absolutely to him.

9. A perusal of Ex.B9, Will, which was admitted by the appellant herein would make it clear that the testator himself in his Will mentioned about the difficult situation of the fourth respondent without a house. He also mentioned about the care that was taken by the fourth respondent and his wife during the period he was bedridden due to illness. Therefore, the bequest made under Ex.B9 appear to be natural and supported by sound reasoning. Over and above, the appellant in his pleadings specifically pleaded that Ex.B9 was obtained by the fourth respondent by employing undue influence. It is settled law that proving a testamentary document lies upon the propounder of the document and on the other hand, if undue influence is pleaded by the other side, the burden is shifted to the person who pleads undue influence. In the case on hand, the appellant had not only admitted the execution of Ex.B9 Will, he had also gone one step further



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and pleaded that it was obtained by the fourth respondent by employing undue influence. However, he failed to lead any evidence to prove the said plea of undue influence. The subsequent Will set up by the appellant was held to be not proved by both the Courts below.

10. While disbelieving the subsequent Will relied on by the appellant, the Courts below had undertaken comparison of signature of the testator found in admitted Will Ex.B9 with the signature of the testator found in disputed Will Ex.A15. After comparison, the Courts below came to a conclusion that the signature of the attestor found in subsequent Will differs with his signature found in the admitted Will. Thus by pointing out all these factors like non-registration of the subsequent Will, non-examination of Thangathamas, to whom the Will was allegedly handed over after execution as per the evidence of P.W.2 and variation in the signatures, the Courts below came to a conclusion that the subsequent Will pleaded by appellant was not at all proved. I do not find anything to interfere with the said factual findings of the trial Court. Hence, I agree with findings of the trial Court that the subsequent Will set up by the appellant under Ex.A15 stands disproved.



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11. The next contention made by the learned counsel for the appellant is that even as per the admitted Will, Ex.B9, the second item of the suit property was given to the appellant and the fourth respondent equally and hence, the Courts below ought not to have dismissed the suit filed by the appellant in its entirety. Ex.B9 Will is admitted one. The appellant pleaded that the same was cancelled by the subsequent Will Ex.A15. The Courts below came to a conclusion that the subsequent Will Ex.A15 was not proved. Under the admitted Will Ex.B9, the first item of the suit property was bequeathed absolutely to fourth respondent and the second item of suit property was bequeathed equally to appellant and fourth respondent. In such circumstances, the Courts below ought not to have dismissed the suit for partition in its entirety and as per the bequest made under the admitted Will namely Ex.B9, the appellant and fourth respondent are entitled to $\frac{1}{2}$ share in the suit property. Therefore, the appellant is entitled to decree for partition in respect of his $\frac{1}{2}$ share under Ex.B9, admitted Will.

12. In view of the discussion made earlier, the substantial question of law is answered in favour of the appellant and the second appeal is partly allowed by



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setting aside the judgment and decree passed by the Courts below insofar as the second item of the suit property is concerned.

13. In nutshell

(i) The second appeal is partly allowed by the setting aside the judgments and decrees passed by the Courts below in respect of item-II of the suit property. The appellant is entitled to preliminary decree for partition of his $\frac{1}{2}$ share in second item of the suit property;

(ii) The judgments and decrees passed by the Courts below in respect of item-I is confirmed; and

(iii) In the facts and circumstances of the case, there will be no order as to costs.

28.02.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
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To

1. The II Additional District Judge, Tuticorin.
2. The Subordinate Judge, Tuticorin.
3. The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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