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A.S.No.1070 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.11.2024

CORAM :

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE C. KUMARAPPAN

A.S.No.1070 of 2012
and M.P.Nos.1 of 2012 & 2 of 2014

S.Amsa Kalyani (Died)

2.K.Ilango

3.Harikrishna

4.Raju

... Appellants

(A2 to A4 are brought on record as the legal representatives of the deceased sole appellant vide Court order dated 08.04.2024 made in CMP.Nos.29593, 29594 & 29596/2023 in A.S.No.1070/2012)

Vs.

1.S.Ravi Ganesan

2.S.Bala Murugan

... Respondents

PRAYER: Appeal Suit filed under Section 96(1) of C.P.C., praying to set aside the judgment and decree dated 02.11.2012 made in O.S.No.38 of 2011 on the file of the Court of the II Additional District Judge, Tiruvallur at



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Poonamallee and consequently allow the above First Appeal.

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For Appellants : Mr.N.Baaskaran for
Mr.M.Manimaran
For R1 : Mr.T.V.Krishnakumar
For R2 : Mr.Suchit Anant Palande

JUDGMENT

(Judgment of the Court was made by *R.SUBRAMANIAN, J.*)

The first defendant is the appellant. The first and second respondents are the plaintiff and second defendant respectively.

2. The appellant is aggrieved by the decree for partition and separate possession granted in favour of the plaintiff, declaring his 1/3rd share in the suit property. The plaintiff's sued for partition contending that the suit property belonged to the mother of the parties namely Navaneetham, who died on 14.12.2002. The said property was purchased under a Sale Deed dated 14.06.2000. As the son, the plaintiff would contend that he would be entitled to 1/3rd share in the suit property. The defendants 1 and 2 are the



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siblings of the plaintiff. The second defendant admitted the case of the plaintiff. The first defendant filed a written statement contending that the suit property was purchased by her, out of her own income in the name of her mother. It was also contended that the mother had executed a Will on 10.10.2002, bequeathing the suit property to the first defendant. Therefore, according to the first defendant, neither the plaintiff nor the second defendant are entitled to a share in the suit property. On the above pleadings, the learned Trial Judge framed the following issues and additional issues:-

- 1) *Whether the Will relied by the 1st defendant dated 10.10.2002 is true, genuine and valid?*
- 2) *Whether the house situated in the suit property is constructed with the loan borrowed by the plaintiff?*
- 3) *Whether the loan has been raised in the name of the plaintiff as narrated by the 1st defendant in her written statement?*
- 4) *Whether the deceased S.Navaneetham was the absolute owner of the suit property and died intestate without execution any testament?*
- 5) *Whether the plaintiff is entitled to 1/3 share?*
- 6) *To what relief the plaintiff is entitled?*

Additional issues:-

- 7) *Whether the plaintiff is entitled to a sum of Rs.72,000/- as mesne profits?*



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8) *Whether the plaintiff is entitled to future mesne profits?*

3. At trial, the plaintiff was examined as P.W.1 and Exs.A1 to A6 were marked through him. The first defendant examined herself as D.W.1. The attesting witness to the Will was examined as D.W.2. The second defendant was examined as D.W.3 and Exs.B1 to B14 were marked through him.

4. The learned Trial Judge, on consideration of the evidence on record, rejected the claim of the first defendant that the property was purchased by her, out of her own income in the name of her mother. The learned Trial Judge also disbelieved the Will by going into certain features found in the Will, which created a considerable doubt as to the execution of the Will by Navaneetham. On the said findings, the learned Trial Judge concluded that the plaintiff and the defendants are entitled to 1/3rd share each in the suit property and a preliminary decree was granted declaring 1/3rd share. Aggrieved against the said decree, the appellant/first defendant has filed the present Appeal Suit.

5. Pending the appeal, the second defendant died unmarried and the plaintiff and the first defendant being the siblings, will be the legal representatives and they would inherit the share in the property equally.



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6. Mr.Baskaran, learned counsel appearing for the appellant would vehemently contend that the Trial Court erred in disbelieving the Will. Drawing our attention to the evidence on record, the learned counsel would submit that once the attesting witness has spoken about the execution of the Will, the Trial Court ought not to have disbelieved the Will on extraneous reasons. The learned counsel would also point out that evidence is available to show that the suit property was purchased from and out of the income of the first defendant, as well as the pension of her grandmother and the money realized by selling the jewels of the grandmother. The learned counsel would further submit that the plaintiff, who was abroad at the time of purchase, did not contribute any money towards the purchase or construction.

7. Contrary to the submission of the learned counsel for the appellant, Mr.T.V.Krishnakumar, learned counsel appearing for the first respondent would submit that Ex.B1 is not at all a Will. He would submit that it is a document relinquishing benami right and the same is invalid after the advent of the Benami Transactions (Prohibition) Act, 1988. He would also point out



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that the evidence of D.W.2 regarding execution and attestation of the Will, is very unnatural and therefore, the Trial Court was right in disbelieving the Will. The learned counsel would also draw our attention to the fact that the Will contains 3 signatures of the executant and D.W.2 would admit that the 3rd signature is in a different ink. It is also pointed out that the 3rd signature is after the signature of the attesting witnesses, which makes it very unnatural.

8. The learned counsel for the appellant would fault the Trial Court for having compared the signatures and for having come to the conclusion that the 3rd signature is in a different ink. According to him, the Trial Court is not competent to carry out such exercise. He would fault the Trial Court for rendering a finding on the nature of the document i.e. gaps between the lines in Ex.B1 – Will.

9. We have considered the rival submissions.

10. On the contentions of the learned counsels for the parties, the following points arise for consideration:-



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1. Whether the Trial Court was right in concluding that the Ex.B1 – Will is not genuine?

11.On the point:-

The relationship between the parties is admitted. The fact that the property stands in the name of the mother of the parties is also admitted. While it is the claim of the plaintiff that he contributed money for the purchase of the property and that the property was purchased in the name of the mother, he would concede the title of the mother and seek 1/3rd share. The second defendant would support the case of the plaintiff. It is the first defendant who wants to deny the share of both the plaintiff and the second defendant by projecting Ex.B1 - Will. She also additionally claims that the property was purchased from and out of her income in the name of the mother. This plea in our considered opinion, is not open to her, in view of the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as 'the Act'), having come into force even in the year 1988, the purchase was in the year 2000. The purchase does not fall within any of the excepted categories under Section 3 of the Act. Therefore, the mother should be presumed to be the owner.



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12. Section 2(h) of the Indian Succession Act, 1925 defines the Will as follows:-

“Will” means the legal declaration of the intention of the testator with respect to his property which he desires to carried into effect after his death.

13. A reading of the above definition would show that a Will must be a document amounting to legal declaration of the intention of a person as to the devolution of his or her property after his or her death. It cannot deal with another person's property. The recitals in Ex.B1 read as follows:-

“மேற்படி சொத்து என் பெயரில் இருந்தாலும்
அது எனது மகள் அம்சகல்யாணிக்கு முழுமையாக
பாத்தியப்பட்ட சொத்தாகும். அதில் எனக்கோ
எனது இரு மகன்களுக்கோ எவ்வித உரிமையோ
பாத்தியதையோ கிடையாது,”

14. This by itself would show that the testator had acknowledged the title of the first defendant in the Will. Therefore the Will itself cannot be considered to be a valid Will, as defined under the Indian Succession Act.



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15. Apart from the above, D.W.2, the attesting witness to the document, though has stated in his proof affidavit that he and the other attesting witness Ponneswari signed the documents in the presence of the testator, in his cross-examination, he has very clearly admitted that he does not know the other attesting witness Ponneswari. He has also admitted that there is a difference between the ink used for the first 2 signatures and the 3rd signature but he would affirm that all the 3 signatures were made with the same pen. He has also admitted that in the last 2 lines of the 2nd page of the instrument namely Ex.B1, there is a lesser gap between the 2 lines, whereas the gap in the 1st 22 lines of the 2nd page is even. These features have been taken into account by the Trial Court to come to the conclusion that it would not be safe to rely upon the Will. The propounder of the Will is bound to prove the execution of the Will, as provided under the Indian Succession Act and the Indian Evidence Act. His or her duty does not stop there. A propounder is also expected to remove all suspicious circumstances surrounding the execution of the Will.

16. In the case on hand, if we had to look at the evidence of D.W.2,



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the evidence by itself creates a doubt in the minds of the Court, as to the execution of the Will. His ignorance about the scribe, the other attesting witness and his admissions relating to the ink in the 2 page of the Will, would show that D.W.2's evidence is not very reliable. Moreover, as we have pointed out earlier, the document admits the title of the first defendant and purports to deal with the property of the defendants. Therefore, it does not fall within the definition of a Will. It can at best be treated as a document releasing a Benami right. Such a document, particularly after the introduction of the Benami Transactions (Prohibition) Act, 1988, is invalid. Even assuming that there can be one such document that must be by way of a registered instrument, there cannot be an unregistered instrument relinquishing a benami right.

17. No doubt, the learned counsel for the appellant would contend that the Trial Court erred in examining the document with its naked eye and coming to the conclusion that the ink is different and the gap between the last 2 lines of the 2nd page of the instrument is lesser. While we agree with the contention of the learned counsel for the appellant that the Court cannot pronounce on the difference on the ink but in the case on hand, we find that



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the findings of the Court is supported by the evidence of D.W.2, the attesting witness himself. We have examined the original Will ourselves and we find that the findings relating to the gap between the last 2 lines of 2nd page of the Will is perfectly justified.

18. We therefore have no hesitation in affirming the findings of the Trial Court regarding the Will. Once the Will goes, the title of Navaneetham having been admitted and the fact that the plaintiff and the defendants are children of Navaneetham, the decree of the Trial Court has to be affirmed.

19. It is stated that the second defendant died a bachelor and therefore, under Section 8 of the Hindu Succession Act, his brother and sister namely the plaintiff and the first defendant would be entitled to his share equally.

20. Accordingly, the Appeal Suit is dismissed and the preliminary decree dated 02.11.2012 made in O.S.No.38 of 2011 is modified, declaring



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half share each to the appellant/first defendant and the first respondent/plaintiff in the suit property. Connected miscellaneous petitions are closed. No costs.

[R.S.M., J] [C.K., J]

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Index: Yes
Non-speaking order
Internet: Yes
Neutral Citation: Yes

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R.SUBRAMANIAN, J.
and
C.KUMARAPPAN, J.

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