



SA.No.1239 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.04.2024

CORAM

THE HON'BLE Mr.JUSTICE **C.KUMARAPPAN**

S.A.No.1239 of 2007

and

MP.No.1 of 2007

Palani

... Appellant

- Vs -

1. Saraswathi
2. Rathinammal
3. Parvathi
4. Radha
5. Vijayalakshmi
6. The Special Tahsildar
(Adhidravidar Welfare)
Dharmapuri.
7. The Government of Tamil Nadu
Represented by the District Collector of Dharmapuri,
Collectorate,
Dharmapuri-636 705.

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree of First Additional District Court, Krishnagiri dated 30.09.2005 in A.S.No.122 of 2003 reversing the judgment and decree of the Subordinate Court of Dharmapuri dated 26.06.2003 in O.S.No.116 of 1998.



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For Appellants : Mr.Ma.Pa.Thangavel
for Mr.M.Lokesh
For Respondents : Mr.M.Muthusamy
Government Advocate for R6 & R7
R1 to R4 -Served. No Appearance
R5-Not ready in notice

J U D G M E N T

The first defendant is the appellant herein. The plaintiff is figured as first respondent herein, and the defendants 2 to 7 are arrayed as other respondents.

2. For the sake of convenience, the parties will be referred to according to their litigative status before the Trial Court.

3. The brief facts, which give rise to the instant second appeal is that, the plaintiff and the defendants 1 to 5 are the children of one Veera Gounder. According to the plaintiff, the suit property is the ancestral property. Therefore, she, being the unmarried daughter, is entitled to have a share in the suit property. It was also contended by the plaintiff that the alleged Will dated 17.05.1993 was not at all executed by her father and that her father



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was not in sound disposing state of mind and he was not in a position to understand what was happening around him. By taking advantage of such position, the first defendant had fabricated the Will. Therefore, it is the contention of the plaintiff that such Will, will not bind upon the plaintiff. Hence, the plaintiff has come forward with a suit for partition.

4. The said suit was resisted by the first defendant by contending that, the suit property is the absolute property of Veera Gounder, and that he has executed a Will dated 17.05.1993 and he died on 14.09.1993. Therefore, after the demise of Veera Gounder, the Will came into operation and the first defendant became the absolute owner of the property by virtue of the Will. It was pleaded that the suit property is not the ancestral property as stated by the plaintiff. It was also pleaded that Veera Gounder was in sound disposing state of mind while executing the Will. Therefore, the first defendant prayed to dismiss the suit.

5. The defendants 2 to 5 were set ex-parte before the Trial Court.

6. Before the Trial Court, the plaintiff herself was examined as PW1 and one more witness was examined as PW2, who was the neighbour. On



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behalf of the defendants, the first defendant himself was examined as DW1 and the attesor of the Will was examined as DW2. On behalf of the plaintiff, as many as 9 documents have been marked Exs.A1 to A9 and on behalf of the defendants, 33 documents were marked as Exs.B1 to B33.

7. The Trial Court, after having considered the oral and documentary evidence has believed the execution of the Will dated 17.05.1993 and thereby, dismissed the suit. Not satisfying with the judgment of the Trial Court, the plaintiff has approached the First Appellate Court, however, the First Appellate Court on re-appreciation of evidence has found that the first defendant has not proved the Will and has not complied the mandatory requirement as contemplated under Section 63(c) of The Indian Succession Act and found that the Will dated 17.05.1993 has not been proved in a manner known to law and ultimately decreed the suit as prayed for. Not satisfying with the judgment of the First Appellate Court, the first defendant is before this Court by way of this Second Appeal.

8. At the time of admission of the Second Appeal on 14.11.2007, this Court has formulated the following substantial question of law:-



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“(i) Whether the lower appellate Court is correct in giving findings contrary to the evidence on record regarding the execution of the Will executed by Veera Gounder?”

“(ii) When the lower appellate Court failed to frame points for consideration in accordance with the mandatory provisions of Order 41 Rule 31 CPC whether the judgment rendered by it, is sustainable in law?”

9. The learned counsel for the appellant/first defendant would vehemently contend that the First Appellate Court, without referring to the evidence and more particularly, without referring to the admission made by the plaintiff as to the execution of the Will, has wrongly arrived at a conclusion that Ex.B1-Will has not been proved. It is also contended by the learned counsel for the appellant that the first defendant by examining the attestor has duly proved the execution of the Will. Therefore, it is the contention of the appellant/first defendant that the judgment of the First Appellate Court is not in accordance with law. It is also contended by the learned counsel for the appellant that they have duly complied with Section 68 of The Indian Evidence Act and Section 63 of The Indian Succession Act. The learned counsel also invited the attention of this Court about the evidence of DW2, where DW2 has spoken about the due compliance of Section 63(c)



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of The Indian Succession Act. It is also contended by the learned counsel for the appellant that the judgment of the First Appellate Court is not in accordance with Order 41 Rule 31 of CPC. Therefore, for all those above reasons, the learned counsel prayed to interfere with the order of the First Appellate Court.

10. Despite the names printed in the cause list, there is no representation on behalf of the respondents.

11. The learned Government Advocate appearing on behalf of the respondents 6 & 7 would submit that they have not filed any written statement before the Trial Court.

12. The gravamen of the submissions of the learned counsel for the appellant/D1 is that late.Veera Gounder has executed a Will dated 17.05.1993 and he died on 14.09.1993. Therefore, after his demise, the Will came into operation and thereby, the suit property becomes his absolute property. Therefore, if the first defendant is in a position to prove Ex.B1-Will, then the suit is liable to be dismissed. If the first defendant failed to prove the Will, then the suit is to be decreed.



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13. In respect of proof of Will, the First Appellate Court has found that, from the evidence of DW2, there is no due compliance of Section 63(c). To put it in other words, the First Appellate Court has found that DW2/attestor has not borrowed the actual word from Section 63(c) of Indian Evidence Act, and has not stated that he had seen the testator signing the Will. However, if we harmoniously look into the evidence of DW2, he has spoken about his presence. However, in so many words, he has not stated about the signature made by the testator, the substance of his evidence would emphasis that he has seen the signing of the testator. Therefore, the finding of the First Appellate Court that the first defendant has not discharged Section 63(c), is not in accordance with law.

14. In spite of the above finding, still this Court is not in a position to give a finding in favour of the appellant on the ground that there are inherent suspicious circumstances in the execution of the Will. On seeing the Will, there is a disinheritance in respect of two unmarried daughters. Further, in spite of plaintiff's categorical defence that the testator was not in sound disposing state of mind, there are no evidence to contradict such defence raised by the plaintiff. On perusal of the evidence of DW1, this Court could find that the propounder of the Will has participated in the execution of the

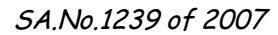


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Will. Apart from the above three grounds, there is also a wild contradiction between the evidence of DW1 and DW2. Wherein DW1 says all the attestors have signed in front of the Registrar, whereas DW2 says they have not signed before the Registrar.

15. Before we delve into the merits of the matter, it is appropriate to discuss the duty cast upon the propounder. It is pertinent to mention here that the moment this Court believes the due execution of the Will, then the last wish of the testator would resurrect and attain immortality. Therefore, there is an onerous duty cast upon the propounder of the Will to dispel all the suspicious circumstances.

16. Here, while perusing Ex.B1 (Will), the testator has stated that he has got two unmarried daughters. But he has not provided any property to the unmarried daughters. This is one of the inherent suspicious circumstances. But while looking at the evidence of DW1, this Court would only find that he has been given responsibility to arrange marriage for his sister. But curiously there is no proof available before this Court as to the expenditure incurred by the first defendant in respect of the marriage



17. It is pertinent to mention here that, the mere participation of the propounder in execution of the Will cannot be construed as one of the suspicious circumstances. But if we look at the conduct of the propounder along with the other inherent suspicious circumstances, this ground would also loom large as yet another suspicious circumstances in execution of the Will.

18. Apart from the above grounds, there is also yet another suspicious circumstance could be seen from the contradiction between the evidence of DW1 and DW2. According to DW1, who is the propounder of the Will. According to him, he was all along present at the time of execution of the



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Will. He has categorically stated that at the time of the attestation, all the attestors have signed in front of the Registrar. Whereas, DW2, who is the attester had spoken differently that he has attested the Will only outside of the Registrar's Office. All those things would indubitably point that there are inherent, natural and reasonable suspicious circumstances embedded over the execution of the Will-Ex.B1.

19. On seeing the evidence of DW1, who is the propounder of the Will, he has not even raised his little finger to dispel the above stated suspicious circumstances. Therefore, this Court is of the firm view that the first defendant has not at all proved the due execution of the Will.

20. Coming to the argument that whether a point for determination has been determined by the First Appellate Court as mandated under Order 41 Rule 31 of CPC, while perusing the judgement of the First Appellate Court, admittedly there is only a omnibus point for determination that whether appeal to be allowed or not. It is pertinent to mention here that while seeing the judgment of the First Appellate Court, though no point for determination arrived on the basis of each issue, all the points have been elaborately



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discussed and there are abundant material to show the reappreciation of evidence by the First Appellate Court. Therefore, though there is no specific point for determination under Order 41 Rule 31 CPC, the First Appellate Court has dealt all the points and the judgment reflect the compliance of Order 41 Rule 31 CPC. Therefore, in view of the above discussion, mere non framing of point for determination cannot be a reason to interfere with the judgment of the First Appellate Court.

21. Thus, in view of the above detailed discussion , the substantial question of law are answered in favour of the respondents.

22. In the result, this Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

16.04.2024

kmi

Index : Yes

Speaking Order

Neutral Citation Case: Yes

To

1. The First Additional District Judge,
Krishnagiri.

2. The Subordinate Judge,
Dharmapuri.



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C.KUMARAPPAN, J

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