



SA.No.562 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.04.2024

CORAM

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

S.A.No.562 of 2007

and

MP.No.1 of 2007

1. Rajambal (died)
2. Dharumayyan
(2nd appellant recorded as LR of the deceased first appellant
vide order dated 09.08.2019)

... Appellants

- Vs -

1. Janaki (Died)
2. Jayalakshmi
3. Ilanjiyan
4. Dhanapalan
5. Sadasivam
6. Panneerselvam
7. Arumugam
8. Thiagarajan
9. Umamaheswari
(R2 to R9 recorded as LRs of the deceased R1
vide order dated 09.08.2019)

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 13.02.2007 in A.S.No.55 of 2006 on the file of the Sub Court, Mannargudi reversing the judgment made in O.S.No.419 of 1999 before the District Munsif's Court, Mannargudi.



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For Appellant : Ms.Nilaphar
for Ms.R.Meenal

For Respondents : Mr.R.Thiyagarajan
for Mr.K.M.Subramaniam for R2 to R9
R1-Died

J U D G M E N T

The defendants are the appellants herein. The respondents are the children of the original plaintiff.

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 suit property was originally belongs to one Janaki Ammal. According to the plaintiff, he is the so called adopted son of Janaki Ammal and Kuppusami Muthiriyar. He also states that, Janaki Ammal executed a registered Will dated 12.01.1975 bequeathing the entire suit property to the plaintiff. The plaintiff further submits that, after the demise of Janaki Ammal, the entire suit property devolves upon him, and that he became the absolute owner of



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the said property. However, the first defendant, who is the wife of Janaki Ammal's brother-in-law [husband's brother] interfered with the possession of the plaintiff, hence, he has come up with a suit for declaration and for delivery of possession.

4. The said suit was resisted by the defendants by contending that the Will was not at all executed by Janaki Ammal, and that the suit property is absolutely belongs to them.

5. Before the Trial Court, the plaintiff has marked as many as 13 documents as Exs.A1 to A13 and on behalf of the defendants, 6 documents have been marked as Exs.B1 to B6. On behalf of the plaintiff, 5 witnesses were examined as PW1 to PW5 and on behalf of the defendants, 4 witnesses were examined as DW1 to DW4.

6. The Trial Court, after having considered the oral and documentary evidence, has disbelieved the Will-Ex.A3, and has also held that the plaintiff is not the adopted son of Kuppusami Muthiriyar and Janaki Ammal. Thus, ultimately dismissed the suit. Not satisfying with the judgment of the Trial



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Court, when Govindasami has filed the First Appeal, the First Appellate Court, though reversed the finding and believed Ex.A3-Will, however, reiterated the finding recorded by the Trial Court that he is not the adopted son. Not satisfying with the judgment of the First Appellate Court, the first defendant has approached this Court by way of this Second Appeal.

7. At the time of admitting the Second Appeal on 14.06.2007, this Court has formulated the following substantial questions of law:-

“i) Whether in law the lower appellate court was right in holding that Exhibit A3 will was valid, when proper attestation was not proved satisfying the requirements under Section 68 of The Indian Evidence Act and Section 63 of The Indian Succession Act?

ii) Whether in law the lower appellate Court was not wrong in allowing I.A.No.83 of 2006, for receiving additional evidence without seeing that the mandates of Order 41 Rule 27 Civil Procedure Code were not satisfied?

iii) Whether in law the lower appellate Court was not wrong in assuming the mantle of a handwriting expert and comparing disputed signatures?

iv) Whether in law the lower appellate Court was right in overlooking that the decree should follow the judgment and



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that there was no finding supporting clause 6 of the decree for mesne profits?”

8. On 31.10.2022, this Court has formulated the following additional substantial question of law:-

“Whether the plaintiff is entitled to the suit property as per Hindu Succession Act?”

9. On 16.02.2024, this Court has formulated yet another additional substantial question of law, which is as follows:-

“Whether in law the lower appellate court was right in misconstruing the line of succession under the Hindu Succession Act, 1956, in particular, Section 15 and 16 thereof?”

10. The learned counsel for the appellants/defendant would vehemently contend that Ex.A3-Will has not at all been proved in the manner known to law, and that the property would devolve only upon Ramasamy and not to the plaintiff. Therefore, would submit that the appeal is liable to be allowed.



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11. However, the learned counsel for the respondents/plaintiff would submit that the Will-Ex.A3 has been proved by producing the document before the First Appellate Court, and the First Appellate Court has taken into consideration of the signature found in the additional documents and in the Will and on comparison of signature held that the Will was duly proved by the respondents and has ultimately reversed the finding. It was also contended by the learned counsel for the respondents that the 2nd defendant is not at all related to Janaki Ammal's family, whereas, the plaintiff is Janaki Ammal's husband's sister's son. Therefore, he has got every right over the property. Therefore, contended that the findings recorded by the First Appellate Court is perfectly in order and does not require any interference.

12. I have given my anxious consideration to either side submissions.

13. The entire issue revolves around whether Ex.A3-Will is proved or not? It is pertinent to mention here that, now the plaintiff has not challenged the finding of both the Courts below that he is not the adopted son of Kuppusami Muthiriyar and Janaki Ammal. Therefore, the issue narrow down, and could be decided subject to the proof of Will and the substantial question of law can be effectively answered.



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14. While dealing with the proof of Will, as rightly submitted by the learned counsel for the respondents, Section 63 of The Indian Succession Act and Section 68 of The Indian Evidence Act are magna carta. However, it is an admitted case that both the attestors in Ex.A3-Will are not available. Therefore, the rigour under Section 63 of The Indian Succession Act as well as the rigour under Section 68 of The Indian Evidence Act will be relaxed and the parties are left to prove the disputed Will by invoking Section 69 of The Indian Evidence Act.

15. For ready reference, this Court deems it appropriate to extract Section 69 of The Indian Evidence Act:-

“69. 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 in his handwriting, and that the signature of the person executing the documents is in the handwriting of that person.”

16. According to Section 69 of The Indian Evidence Act, in the absence of attesor or when they are not found, in order to prove a Will, the



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propounder has to prove that the signature of one attesting witness is in his handwriting, and that the signature of the person executing the document (testator) is in the handwriting of that person. In order to comply with such mandatory requirement as contemplated under Section 69 of The Indian Evidence Act, the plaintiff has examined PW3 and PW4, who are the sons of the attester. But both the Courts below have disbelieved the oral evidence of PW3 and PW4. However, the First Appellate Court, by taking into consideration of the additional document, which has been submitted by invoking under Order 41 Rule 27 CPC, which contains the signature of one of the attester, has compared the signature and found that the signature of one of the attester has been proved.

17. Even for argument sake, if such finding is in order, still the absence of proof in respect of the executant's signature (testator) as mandated under Section 69 of The Indian Evidence Act, would compel this Court to hold that the Will-Ex.A3 has not been proved. In view of the above reason, the twin requirements mandated under Section 69 of The Indian Evidence Act has not been complied with by the plaintiff. Therefore, the findings recorded by the First Appellate Court that the Will has been proved, by merely comparing



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with the signature of the attesor in the absence of proof regarding the signature of the testator, is absolutely a perverse finding, which is liable to be interfered with.

18. Therefore, if once this Court comes to a conclusion that the Will has not been proved, the next aspect is, whether in any other way the plaintiff has got any right over the property. In this regard, it is an admitted fact that he is the son of Kathayee, who is the sister-in-law of Janaki Ammal. At this juncture, the learned counsel for the appellant would draw the attention of this Court in respect of the plaint pleading. Wherein Janaki Ammal died during March 1975. However, by considering the pleading in paragraph 2 of the plaint, this Court can very well hold that Kathayee died during 1939, because, according to the plaint pleading, when the plaintiff was at the age of 5, her mother died and in the plaint, the plaintiff's age has been stated as 60 years. Therefore, according to the plaint pleadings, Kathayee was not alive during March 1975.

19. If that being the case, whether Ramasamy Muthiriyar was alive on the relevant date is the next important aspect. As such, in this regard, the



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learned counsel for the appellant has relied paragraph 5 of the plaint averment, wherein there is a specific averment that on the date of demise of Janaki Ammal, Ramasamy Muthiriyar was alive. Therefore, under the Hindu Succession Act, the plaintiff, being the son of the sister-in-law of Janaki Ammal, comes in the entry 4 of Clause II, whereas Ramasamy Muthiriyar comes under the entry 2 under this clause. Therefore, the nearer entry would be preferred than the later entry. If in that event, the plaintiff cannot be the owner of the property.

20. The learned counsel for the respondents would submit that, the 2nd respondent is not at all related to Janaki Ammal's family. If in any event, the suit is dismissed, it would be in favour of the defendants. But, this Court does not declare any right upon the defendants. This Court is only answering the substantial questions of law. While answering the substantial questions of law, the ultimate finding recorded by the First Appellate Court appears to be perverse and liable to be interfered with.

21. At this juncture, the learned counsel for the respondents would submit that according to the Hindu Succession Act, the property devolve



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upon Ramasamy Muthiriyar. Therefore, the rights of the parties/heirs in respect of the estate of Ramasamy Muthiriyar is to be preserved. In view of the above detailed discussion, the substantial questions of law are answered in favour of the appellants.

22. In the result, the Second Appeal is allowed. The judgment of the First Appellate Court made in A.S.No.55 of 2006 is hereby set aside and the suit in O.S.No.419 of 1999 is dismissed. However, the rights of the parties in respect of the estate of Ramasamy Muthiriyar is left open. There shall be no order as to costs. Consequently, connected Miscellaneous petition is also closed.

24.04.2024

kmi

Index : yes

Speaking Order

Neutral Citation Case: Yes

To

1. The Sub Court,
Mannargudi.
2. The District Munsif Court,
Mannargudi.

C.KUMARAPPAN, J



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