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SA.No.487 of 2006

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.04.2024

CORAM

THE HON'BLE Mr.JUSTICE C.KUMARAPPAN

S.A.No.487 of 2006
and
C.M.P.No.6182 of 2006

D.Rajammal

... Appellant

- Vs -

1.R.Muthusamy (died)

2.S.Santhana Lakshmi

3.M.Venkatesan

4.S.Gokilavani

... Respondents

(Respondents 2 to 4 were brought on record as LR's of sole respondent vide order dated 10.02.2015 in C.M.P.Nos.24 to 26 of 2015)

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 31.08.2005 in A.S.No.27 of 2005 passed by the learned Principal Subordinate Judge, Coimbatore, reversing the judgment and decree dated 18.10.2004 in O.S.No.258 of 2003 passed by the learned I Additional District Munsif, Coimbatore.

For appellant : Mr.M.Sriram

For respondents 2 to 4 : Mr.Mukunth, Senior Counsel for
M/s.Sarvabhuman Associates

J U D G M E N T



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The plaintiff is the appellant herein. The sole defendant was arrayed as the respondent. After his demise, his legal heirs were impleaded as the respondents 2 to 4.

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

The brief facts, which give rise to the instant Second Appeal, are as follows:

3. The suit property is the absolute property of one Rangasamy Naidu. The said Rangasamy Naidu has three children, viz., the plaintiff, the defendant and one Govindaraj. The suit property was purchased by the plaintiff's father by virtue of the sale deed dated 10.10.1934. The house property was purchased by the plaintiff's father by his own earnings on 06.04.1984. As the defendant was in need of a house, the plaintiff's father rented out a portion of the house to the defendant and was collecting rent. In the year 1984, when there was a dispute between the plaintiff's father and the defendant, the plaintiff's father filed a suit in O.S.No.895 of 1984 for delivery of vacant possession and for rent. However, after the demise of their father on



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10.01.1988, since the defendant agreed to pay the rent, the suit was allowed to be dismissed for default.

4. During the lifetime of the plaintiff's father, he executed a registered Will dated 30.09.1985, in which, A schedule to the Will was bequeathed to Govindarajan, who is one of the brothers of the plaintiff, and B schedule to the Will was bequeathed to the share of the plaintiff. In the said Will, no bequeath was made to the defendant. The plaintiff further submit that she has been in possession and enjoyment of the suit property ever since the date, the Will came into force. In the month of March 2000, the defendant suddenly stop paying rent of Rs.500/- p.m., which was agreed by him in panchayath held, as early as in the year 1992. In spite of repeated demands, the defendant did not care to pay the rent and suddenly made clandestine attempts to sell away the suit property. Hence, the plaintiff issued lawyer notice. After received, the defendant gave untenable reply. Since the defendant interfered with the possession of the plaintiff and also attempted to sell the property, the plaintiff has come forward with the present suit for permanent injunction not to alienate or encumber the suit property, and also restraining the defendant, his men and agents from interfering with the



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peaceful possession and enjoyment of the suit property by the plaintiff.

5. The said suit was resisted by the defendant by contending that the suit property is ancestral in character. Therefore, his father has no right to execute the Will in respect of the entire property. The further pleading was that the disposal of O.S.No.895 of 1984 is *res judicata* to the instant suit. This defendant has specifically denied the execution of the Will dated 30.09.1985 and it is also the case of the defendant that his father has no right to execute the Will and that the Will must be a forged and fabricated one.

6. It is the further submission of the defendant that he has been in possession of the house property in his own right, and not as a member of the Hindu joint family or as a tenant. It is the submission of the defendant that, through mediators, there was a division among the family members and the suit property was allotted to the defendant as early as on 14.09.1983 and Since then, he has been in possession and enjoyment of the suit property. Hence, it is the submission of the defendant that the suit is not maintainable and liable to be dismissed.

7. Before the Trial Court, the plaintiff was examined as P.W.1 and



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one more witness viz., Rajendra Babu was examined as P.W.2, and 10 documents were marked as Exs.A1 to A10. On behalf of the defendant, the defendant was examined as D.W.1 and two more witnesses viz., Govindaraj and Velayutham, were examined D.W.2 and D.W.3, respectively, and 12 documents were marked as Exs.B1 to B12.

8. The Trial Court, after having considered the oral and documentary evidence, has found that the suit property is the absolute property of the plaintiff's father, and has also found that the Will executed by the plaintiff's father Rangasamy was proved in a manner known to law. As a result of which, the plaintiff was granted the relief as prayed for.

9. Aggrieved by the same, the defendant has preferred an appeal. When the defendant approached the First Appellate Court, the First Appellate Court arrived at a conclusion that the suit property is the ancestral property and therefore, the plaintiff's father Rangasamy has no right to execute the Will and ultimately, allowed the appeal by dismissing the suit.

10. Not satisfied with the judgment of the First Appellate Court, the



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plaintiff has approached this Court by way of this Second Appeal.

11. At the time of admission, the following substantial questions of law were formulated:

“ 1. Whether in law, the Lower Appellate Court is right in concluding that for a mere reason that the suit property was purchased in the name of appellant's father by his guardian during his minority, the property belongs to joint family?

2. Whether the Lower Appellate Court has rightly constructed Ex.B5 Muchilika in accordance with law, more particularly in view of a condition precedent clause found therein?”

12. The learned counsel appearing on behalf of the appellant/ plaintiff would vehemently submit that the reliance on panchayat Ex.B5 Muchalika by the First Appellate Court is erroneous. It is the contention of the plaintiff that such document, though appears to have come into existence prior to filing of suit in O.S.No.895 of 1994, the same had not been referred to in the said suit and such glaring lacuna on the part of the defendant's plea has not at all been considered by the First Appellate Court. It is also



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contended by the learned counsel for the appellant that there was a material alteration in Ex.B5, which would make the said document void *ab initio*. It is also the contention of the plaintiff that since the attesor to Ex.A6/Will has died, the person, who knowing the signature of the attesor and testator have been examined. Therefore, the learned counsel for the plaintiff would submit that the plaintiff proved the Will and thereby, they have established their title. Therefore, the learned counsel would contend that the judgment of the First Appellate Court is perverse and liable to be interfered with. To buttress her contention, the learned counsel for the appellant relied upon the judgment of the Hon'ble Supreme Court in the case of ***Ashuthosh Samanta (D) by Lrs. and others vs. SM.Ranjan Bala Dasi and others*** reported in ***2023 SCC Online SC 255***.

13. Per contra, the learned Senior Counsel for the respondents/legal heirs of the defendants would submit that the suit property is an ancestral property, which could be fortified by the fact that on the date of purchase of the suit property, the plaintiff's father was minor. The learned Senior Counsel would further submit that the Will Ex.A6 has not been proved in the manner known to law. It is also the contention of the learned Senior Counsel that in



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the suit for injunction, the plaintiff cannot attempt to prove the Will. It is also the contention of the learned Senior Counsel that the plaintiff has not proved the Will in the manner known to law. Therefore, the finding recorded by the First Appellate Court does not require any interference.

14. In order to substantiate his contentions, the learned Senior Counsel for respondent has relied upon the following judgments:

1. *Valliammal vs. Sadayappan and others* reported in **2022 SCC Online Mad 1611**;
2. *K.Laxmanan vs. Thekkayil Padmini and others* reported in **(2009) 1 SCC 354**;
3. *Kasthuri Bai and others vs. V.Ashok Kumar and others* reported in **2017 (2) CTC 35**;
4. *K.Sankaralingam and others vs. Yesuraj and others* reported in **2020 (5) CTC 727**;
5. *Babu Singh and others vs. Ram Sahai alias Ram Singh* reported in **(2008) 14 SCC 754**.

15. I have given my anxious consideration to the submission made by both sides.

16. The substantial questions of law is in respect of whether the suit property is the ancestral property, and whether the Muchalika/Ex.B5 can be



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relied or not. This can be answered, from the observations made by the First Appellate Court. Wherein, the First Appellate Court has categorically found that the suit property was purchased by one Chinnammal, who is the grandmother of the plaintiff and the mother of the testator Rangasamy. Therefore, when there is a specific finding that the suit property was purchased by Chinnammal, and when Chinnammal is no more, naturally, the property devolves upon the plaintiff's father. Therefore, it would naturally become his absolute property by virtue of Section 15 of the Hindu Succession Act, 1956. Therefore, the finding recorded by the First Appellate Court that the suit property is an ancestral property is perverse finding and liable to be interfered with.

17. In view of the above erroneous finding, the First Appellate Court has been swayed and has not gone into the veracity of Ex.A6 Will executed by the father of the plaintiff and defendant qua Rangasamy Naidu. However, across the bar, there were effective arguments made by either side. The learned counsel for the appellant/plaintiff would submit that the finding recorded by the Trial Court in respect of the proof of Will is well-merited and has to be considered. Whereas, the respondents/defendant would contend that



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though, admittedly, both the attestors to Ex.A6/Will died, the plaintiff has not complied with the provisions of Section 69 of the Indian Evidence Act, 1872. Therefore, Ex.A6/Will cannot be construed as a proved one.

18. While looking at the facts of the case, the Will was executed by the plaintiff and defendant's father Rangasamy, and it is not in dispute that both the attestors to the said Ex.A6/Will is no more. Therefore, now, there is a duty cast upon the Court to decide in respect of proof of Will in the absence of the evidence of attestor. In this regard, the primordial objection made by the defendant is that, the Will is a forged one and the testator has no right to execute such Will. Now that in the preceding part, this Court found that that the suit property is the absolute property of Rangasamy. Therefore, late Rangasamy has got right to execute the Will.

19. While considering the second limb of the defence that, the Will is a forged one, no doubt, when a propounder is attempting to prove the Will, the onus is heavy upon the propounder to dispel all suspicious circumstances. Now the suspicious circumstances to be answered in respect of whether Ex.A6/Will was a forged one. Apart from that, this Court could also find yet

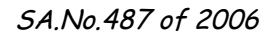


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another inherent suspicious circumstance of disinheritance of the defendant.

Now let us see whether the plaintiff has dispelled these suspicious circumstances. The learned counsel for the plaintiff would submit that, even during the lifetime of Rangasamy, there was no cordiality between the defendant's father Rangasamy and the defendant. Further, until the death of Rangasamy, the suit was pending. Therefore, the submission made by the learned counsel for the plaintiff that disinheritance is a natural one, as there was subsisting enmity and disharmony between the defendant and the testator Rangasamy, has to be accepted.

20. While addressing the defence that the Will is forged, this Court deems it appropriate to discuss the legal position in respect of the Indian Succession Act, 1925 and the Indian Evidence Act, 1872. Section 63 of the Indian Succession Act, 1925, speaks about the mode of execution of the Will. More particularly, Section 63(c) speaks as to how the Will is to be attested. Likewise, Section 68 of the Indian Evidence Act deals about the mode of proof of documents, which are to be compulsorily attested. According to Section 68 of the Indian Evidence Act, if the document is to be compulsorily attested, such document has to be proved before the Court through



21. It is pertinent to mention here that when, the attestors are not found or died, the rigour under Sections 63(c) of the Indian Succession Act coupled with Section 68 of the Indian Evidence Act would get diluted and relaxed. However, it is the duty of propounder to prove the twin element qua, by examining the person, who knew about the signature of the attestor and testator of the Will in question. Here, in our case, the plaintiff has examined D.W.2, who is the son of the one of the attestors and he has proved the signature of one of the attestors. Coming to the proving of testator's signature, the plaintiff would submit that through her (P.W.1) evidence, she has identified his father's (testator's) signature. Therefore, it is the contention of the plaintiff that they have complied with twin requirement as mandated under Section 69 of the Indian Evidence Act.

22. At this juncture, the learned Senior Counsel of the respondent/defendant would rely upon the judgment of the Hon'ble Supreme



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Court, in the case of **Ashuthosh Samanta**, (cited supra) wherein, the Hon'ble Supreme Court has held that if any attesting witness is not found or dead, the rigour under Section 63(c) of the Indian Succession Act, and Section 68 of the Indian Evidence Act, the will get diluted. The above judgment has also relied upon the judgement of **Babu Singh and others vs. Ram Sahai alias Ram Singh** reported in (2008) 14 SCC 754 and has also referred to Section 71 of the Indian Evidence Act and has ultimately extracted Babu Singh's case in para 16. For ready reference, the same is extracted hereunder:

“16. In Babu Singh v. Ram Sahai alias Ram Singh, the Court held as follows with regard to Section 69:

“It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the Court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the will may be proved in the manner indication in Section 69 i.e., by examining witnesses who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others.

18. Whereas, however, a will ordinarily must be proved keeping in view the provisions of Section 63 of the Succession Act and Section 68 of the Act, in the event the ingredients thereof, as noticed



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hereinabove, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved.””

23. From the above narration, it is very much obvious that once the plaintiff has discharged his burden under Section 69, the burden shifts upon the defendant to disprove the statement made by the plaintiff. Here, in this case, it is pertinent to mention here that the learned Senior Counsel appearing on behalf of the respondents/defendant by relying upon **Kasthuri Bai's** case (cited supra), would contend that the plaintiff has not proved the Will as contemplated under Section 69 of the Indian Evidence Act. As per the above reported judgment, the signature of the attestor alone was identified and no attempt was made to identify the signature of executor/testator. Only in that context, the Court found that the Will has not been proved.

24. The learned Senior Counsel has, in all fairness, relied upon **Babu Singh's** case (cited supra) and the relevant paras are 17 and 18:

“17. It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be



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traced despite diligent search. Only in that event, the will may be proved in the manner indication in Section 69 i.e., by examining witnesses who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others.

18. Whereas, however, a will ordinarily must be proved keeping in view the provisions of Section 63 of the Succession Act and Section 68 of the Act, in the event the ingredients thereof, as noticed hereinabove, are brought on record, strict proof of executing and attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved.”

25. In the above judgment, the Supreme Court has categorically held that, if the attester is not found or dead, strict proof of execution and the attestation, stands relaxed. The learned Senior Counsel has also relied **Lakshmanan's** case (cited supra). But, while harmoniously seeing the above judgment, there is a finding that one attesting witness was found and only in that context, Supreme Court held that the Will has not been proved.

26. The learned Counsel has also emphasized the ruling reported in **Valliammal's** case (cited supra) and has projected that in para 14 of the



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reported Judgement, there is a reference that to prove the Will under Section 69 of the Indian Evidence Act, “someone”, who can speak about the attestation and the signature of the attestor, and to the signature of the testator, has to be examined. The learned Senior Counsel has given more emphasis to the word 'someone' and would contend that 'someone' does not include the plaintiff, who is the daughter of the attestor. It is the contention of the learned Senior Counsel that when the defendant disputed the Will, there is a duty cast upon the plaintiff to examine the independent witness. However, this Court, respectfully, disagrees with the submission made by the learned Senior Counsel, on the simple ground that here, the plaintiff, by examining herself, has identified the signature of testator. If really, the defendant is having any issue in respect of such proof he could have very well disprove the plaintiff's evidence, as the burden shifts upon him.

27. The learned Senior Counsel would contend that mere *ipsi dixit* of P.W.1 alone can't be relied as she is the interested witness, therefore to satisfy the mind of ordinary prudent man a corroboration to the P.W.1 evidence is necessary. While looking at the corroboration, this Court deems it appropriate to refer to the registration made in Ex.A6/Will. According to



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Section 114 of the Indian Evidence Act, any act done before the Government authority has to be done in an appropriate manner. Therefore, the evidence of the plaintiff, which is coupled with registration, is definitely sufficient to hold that the plaintiff has discharged his onus. As already stated, if really, the defendant has got any grievance in respect of the above proof, he ought to have come to the box and proved that the signature found in the Will is not that of his father herein. In this case, except his pleading that the Will is forged, he has not at all mentioned that the signature found in the Will/Ex.A6 is not that of his father. Therefore, this Court to hold that the finding of the Trial Court that Ex.A6/Will has been proved by the plaintiff is perfectly in order.

28. In view of such peculiar circumstances, this Court is of the firm view that, as rightly found by the Trial Court, the plaintiff's right over the suit property is established. If such right is established, then, according to the axiom of possession follows with title, the plaintiff is entitled to have an injunction.

29. In view of the above detailed discussion, the substantial questions of law are answered in favour of the appellant.



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30. In the result, the Second Appeal is allowed by setting aside the order of the First Appellate Court and by restoring the decree and judgment of the Trial Court. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

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Internet: Yes/No

Index : yes/No

Speaking Order/Non-speaking order

Neutral Citation Case: Yes/No

apd

To

1. The Principal Subordinate Judge, Coimbatore.
2. The I Additional District Munsif, Coimbatore.
3. The Section Officer, V.R.Section, High Court, Madras.

C.KUMARAPPAN, J

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