



S.A.No.1389 of 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.04.2024

CORAM

THE HONOURABLE Mr. JUSTICE **C.KUMARAPPAN**

S.A.No.1389 of 2010
and
MP.Nos.1 of 2010 and 1 of 2015

1.R.Sivashanmuga Raja
2.Rajalakshmi

...Appellants

Vs.

1.Muthamizhselvi
2.Senthamizhselvi
3.Latha
4.Rajasudha

...Respondents

Prayer: Civil Revision Petition filed under Section 100 of the Code of Civil Procedure, against the judgment of the learned Principal District Judge, Cuddalore, in A.S.No.36 of 2007 dated 26.07.2010, confirming the decree and judgment of the learned Subordinate Judge, Chidambaram in OS.No.164 of 2003 dated 07.10.2005.

1/12



For appellants : Mr.K.A.Ramakrishnan
for Mr.J.Shanmugasundara

For Respondents : Mrs.V.Srimathi for R1 to R4

ORDER

The appellants herein are the defendants before the trial Court. The first respondent is the second plaintiff and the second respondent is the first plaintiff before the trial Court. The respondents 3 & 4 are the children and the legal representatives of the first plaintiff.

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

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

Originally the suit property belongs to one Rathinasamy. The plaintiffs 1 to 3 are the daughters of late Rathinasamy through his first wife Pavunammal. After the demise of Pavunammal, he was married to one



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Adhilakshmi and through her, the defendants 2 & 3 were born to Rathinasamy. It is the submission of the plaintiffs that the suit property is the absolute property of Rathinasamy. Therefore, they are entitled to have 12/20th share in the suit property and hence, prayed for preliminary decree in this regard.

4. The said suit was resisted by the defendants 2 & 3 contending that Rathinasamy executed a Will dated 09.09.1996 and by virtue of the Will, the defendants 2 & 3 became the absolute owner of the suit property and hence prayed to dismiss the suit.

5. Before the trial Court, the plaintiffs examined three witnesses as PW1 to PW3 and marked four documents as Ex.A1 to Ex.A4. On behalf of the defendants, three witnesses were examined as DW1 to DW3 and one exhibit has been marked.

6. The trial Court after having considered the oral and documentary evidence arrived at the conclusion that the case set up by the



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defendants 2 & 3 based upon the Will dated 09.09.1996 cannot be believed and ultimately decreed the partition and separate possession of the suit property as prayed for.

7. The trial Court decreed the suit for partition and separate possession of 1/5th share in items 1 to 5 and 8 of the suit property and 6/20th share in items 6 & 7 of the suit property and 1/15 share in items 9 & 10 of the suit property. Aggrieved by the same, the defendants 2 & 3 preferred the First Appeal and the First Appellate Court has concurred with the findings of the trial Court and dismissed the appeal. Not satisfied with the order of the First Appellate Court, again the defendants preferred this Second Appeal.

8. At the time of admission of the second appeal on 28.01.2022, the following substantial questions of law were framed by this Court:

“1) Whether the Courts below are right in holding that Ex.B1, a registered Will was not proved by the second defendant and cannot sustain?”



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2) Whether the Courts below are right in holding that the Will was not proved without considering the evidence of DW2, attesting witness and Ex.B1?

3) Whether the Courts below are right in holding the plaintiffs are entitled to share without considering Section 29A of the Hindu Succession Act as the plaintiff were married before 1989?"

9. The learned counsel for the appellants/defendants submitted that the findings of the trial Court in disbelieving the evidence of the attesor DW2 is erroneous and perverse, and contended that since there was some enmity between the first plaintiff and DW2 attesor, the same cannot be the sole reason to disbelieve his evidence qua the attesor. It is also contended by the learned counsel for the appellants that filing of the registration copy of the Will cannot be suspicious circumstances as it was obtained from the Sub-Registrar's Office.

10. The learned counsel for the appellants would submit that the



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evidence of DW2, who is the attesor, has categorically explained all the mandatory requirements as contemplated under Section 63 of the Indian Succession Act. Therefore the findings rendered by both the Courts below that Ex.B1 Will is not proved, is perverse. Hence prayed to interfere with the judgment of both the Courts below.

11. Per contra, the learned counsel for the respondents/plaintiffs would invite the attention of this Court in respect of the orders of the trial Court, where the trial Court listed out the numerous suspicious circumstances such as non production of the original Will, and non examination of the first defendant and also the enmity between the first plaintiff and DW2 attesor. The learned counsel for the respondent would further submit that when there is a suspicious circumstances exist in the execution of the Will, it is the duty of the propounder to remove all the suspicious circumstance. Whereas, the defendants have miserably failed to remove all the suspicious circumstances. Therefore contended that the submissions made by the learned counsel for the appellants that the findings of both the Courts below are perverse, cannot be accepted at all. Hence, the learned counsel prayed to dismiss the appeal.



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

13. The entire case revolves around the case of Ex.B1 Will. If Ex.B1 Will is disbelieved then, the decree of the trial Court is to be confirmed. While considering the execution of the Will, as mandated under Section 68 of the Indian Evidence Act, the Will has to be proved only by examining one of the attesting witness to the Will. Here, DW2 was examined as the attestor, and during his examination, DW2 has categorically admitted that there was an enmity between the first plaintiff and DW2.

14. This aspect has been considered by the trial Court and has found that this is also a suspicious circumstances. Though as rightly contended by the learned counsel for the appellants/defendants that mere enmity may not be a ground to suspect the reliability of DW2 evidence. However in the present circumstances of the case, where the defendants who set up the defence of Will did not produce the original Will makes the findings recorded by the trial Court is logical. If the defendants produced the



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original Will and if there is any findings by the trial Court that on the ground of enmity, if DW2 evidence is disbelieved, then this Court has some ground to interfere with the findings of the trial Court. However, when the original Will has not seen the light of the day and surface to before the Court, and that when there are no factual foundation made in the written statement for the production of the registration copy of the Will, this Court is of the firm view that the findings recorded by the trial Court in respect of the suspicious circumstances is well merited and bound to be acceptable.

15. At this juncture, the learned counsel appearing on behalf of the appellants relied upon the judgments: 1) ***The State of Haryana Vs. Ram Singh, reported in 2002-2-L.W.3.*** and 2) ***Chinnappan Vs. Rosemary & Others, reported in 2014-3-L.W.66.*** Through the above precedent it was contended that the registration copy of the document is admissible in evidence in the place of the original document. Absolutely there is no grievance in respect of the above settled legal principle. But the facts of the said reported case is altogether different to the facts of the case in hand. The reported judgment dealt in respect of the Sale Deed and the Sale Agreement.



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Only in that context it was held that receipt of the registration copy is admissible. But we are dealing with the Will which is more sanctifying document and will come into force after the demise of the executor. Therefore, there is additional responsibility to the testamentary Court to analyse all aspect more carefully and with forensic insight.

16. The moment this Court believes the execution of the Will, then the last wish of the testator attains the status of immortality. Therefore, there is onerous responsibility cast upon the propounder of the Will to prove the execution by dispelling all suspicious circumstances. However, in this case as rightly found by the trial Court as well as the first Appellate Court, the defendants have miserably failed to prove the due execution of the Will.

17. At this juncture, the learned counsel for the appellants also invited the attention of this Court in respect of M.P.No.1 of 2015 wherein, a leave was sought by the appellants so as to let in further evidence by summoning the Sub-Registrar to prove the signature of the testator. It is pertinent to mention, at this stage that, Second Appeal has been filed during



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the year 2010, but this application has been filed only in the year 2015.

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18. Apart from that when the trial Court has given a specific finding that non-examination of the Sub-Registrar is also a ground to suspect the Will, the appellants ought to have taken these steps before the First Appellate Court. Therefore, the negligence on the part of the appellants in not moving an application before the First Appellate Court is also liable to be found against the appellants, as the relief under Order 41 Rule 27 of CPC, is an exceptional remedy and the same cannot be granted for the sake of asking to fill up the lacuna. Therefore, this Court does not find any merit even for the M.P.No.1 of 2015. Hence, this petition is liable to be dismissed.

19. Therefore, the factual findings recorded by the trial Court in respect of the suspicious circumstances is bound to be accepted. Thus in view of the above discussions the substantial questions of law are answered in favour of the respondent.



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20. In the result, this Second Appeal is dismissed. There shall be no order as to costs. M.P.No.1 of 2015 is dismissed. Consequently, connected MP.No.1 of 2010 is closed.

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Index : Yes / No
Internet : Yes / No
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To

- 1.The Principal District Judge, Cuddalore,
- 2.The Subordinate Judge, Chidambaram.



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