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S.A.No.1617 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.06.2024

PRONOUNCED ON : 25.07.2024

CORAM

THE HONOURABLE MR.JUSTICE V.SIVAGNANAM

S.A.No.1617 of 2011

G. Jadeshwari

...

Appellant

Vs.

1. P. Revathi

2. T. Rameshbabu

3. B. Vijayalakshmi

...

Respondents

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 28th September 2010, passed by the Additional District Judge, Fast Track Court No.2, Salem in A.S.No.37 of 2010 upholding the judgment and decree dated 25.02.2010 passed by the Principal Sub-Judge, Salem in O.S.No.77 of 2008.

For Appellant : Mr. S. Ramesh

For respondents : Mr. P. Jagadesan, for R2



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JUDGMENT

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Challenge in this second appeal is made to the Judgement and Decree dated 28.09.2010 passed by the learned Additional District Judge, Fast Track Court No.2, Salem in A.S.No.37 of 2010, confirming the Judgment and Decree dated 25.02.2010 passed by the learned Principal Sub Judge, Principal Sub Court, Salem.in O.S.No.77 of 2008 .

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. The plaintiff in O.S.No.77 of 2008, on the file of the Fast Track Court No.II, Salem, is the appellant in this second appeal. She filed the suit for partition seeking 1/4 share in the suit schedule property.

4. The averments stated in the plaint are that the plaintiff and the defendants 1 and 3 are daughters and the 2nd defendant is the son of one Saraswathi Ammal, who is the wife of one Thirumalaisami. The suit schedule property is the absolute property of the said Saraswathi Ammal and she died intestate leaving behind the plaintiff and the defendants as her legal heirs. All



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are jointly possessing and enjoying the suit property and hence, they are having right of 1/4 equal share in the suit property. When the plaintiff demanded for partition, the 2nd defendant with the help of other defendants trying to sell the property. Hence, the suit.

5. The first defendant has filed written statement and expressed her no objection to pass a decree in favour of the plaintiff.

6. The second defendant has filed written statement contending that the allegations stated in the plaint are false. Saraswathi Ammmal bequeathed her property by way of a registered Will dated 04.11.1987 in favour of the second defendant and according to the said will, he is the absolute owner of the suit property. After the demise of the said Saraswathi Ammal, he is in possession and enjoyment of the suit property. Patta for the said land was also transferred in the name of the second defendant and thus, pleaded to dismiss the suit.

7. On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the trial Court for consideration:

- I. Whether the plaintiff is entitled for 1/4 share in the suit property ?**



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2. Whether the 2nd defendant is entitled to the suit property as per the Will dated 04.07.1997 executed by the Saraswathi Ammal ?
3. To what relief?

8. Before the Trial Court, in support of the plaintiff's case, the plaintiff examined herself as PW1 and 2 documents were marked as Ex.A.1 & Ex.A.2. On the side of the defendants, the second defendant examined himself as DW1 and one Savarimuthu, who signed as witness in the Will was examined as DW2 and 12 documents were marked as Ex.B.1 to Ex.B12.

9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Trial Court, by its judgment and decree dated 25.02.2010, dismissed the suit. Aggrieved over the same, the plaintiff has preferred the First Appeal in A.S.No.37 of 2010 before the Additional District Judge, Fast Track Court No.2, Salem. The First Appellate Court, after considering the entire materials, concurred with the findings of the Trial Court, dismissed the appeal by a judgment and decree dated 28.09.2010. Now, challenging the same, the present Second Appeal has been filed.



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10. The second appeal has been admitted on the following substantial question of law:

1. Whether the Courts below were right in brushing aside the strong suspicious circumstances surrounded by the Will, i.e., to say testatrix disposing state of mind, her illness and physical infirmity which totally incapacitated her to write a Will without adverting any reason especially when the propounder of the Will has miserably failed to dispel the same to the satisfaction of the Court in legal manner ?
2. Whether the Courts below are correctly applied the law while dealing with suspicious circumstances ?
3. Whether the judgment and decree passed by the lower Courts are perverse and illegal as both the Courts failed to consider the material discrepancies and lacunas in deposition and recorded findings based on presumption ?
4. Whether the Courts below are right in evaluating the contradictory statement of attesting witness regarding the testator's signature and her thumb impression in the alleged Will in spite of her admitted physical infirmity ?
5. Whether the lower appellate court being final fact finding



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authority is right in dealing with appeal without formulating specific issues as contemplated under Order 41 Rule 25 ?

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6. Whether in view of the written statement of the defendant No.1, the lower court ought to have held that failure of the testator to provide any property for her own daughters was a suspicious circumstance that would cast a shadow on the due execution of Will ?

11. The learned counsel appearing for the appellant/plaintiff contended that the judgment and decree of the Trial Court as well as the First Appellate Court is against law and both the Courts below failed to consider the strong suspicious circumstances surrounded by the Will dated 04.11.1987. The Trial Court as well as the First Appellate Court failed to consider the material discrepancies in the evidence of the attesting witnesses and the Will is not proved in accordance with law. The findings of both the Courts below are perverse and not based upon the evidence. The Trial Court and the First Appellate Court failed to consider the fact of physical infirmity of the testator, which is admitted by the parties. There is no cogent and satisfactory evidence to prove the Will. The findings of the Courts below are erroneous and liable to be set-aside. Further, the learned counsel reiterated the grounds raised in the



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grounds of appeal and thus pleaded to allow the second appeal.

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12. The learned counsel appearing for the second respondent supported the judgment of the Trial Court and the First Appellate Court and contended that the Will is proved by the attester in accordance with law. There is no suspicious circumstances surrounded the Will. The Will is executed by the mother of the plaintiff, in which, life interest has been given to her husband and after his life period, it was given to her son/2nd defendant. At the time of execution of the Will, since the 2nd defendant was minor, he was not participated in the execution of the Will and his father was appointed as a Guardian. Under these circumstances, there is no suspicious circumstances surrounding the Will. The Trial Court and the First Appellate Court had rightly non-suited the plaintiff and the plaintiff is not entitled to claim any share over the plaint schedule property. There is no merit in this Second Appeal and no substantial question involved in this Second Appeal and thus, pleaded to dismiss the Appeal.

13. I have considered the matter in the light of the submissions made by the learned counsel on both sides and perused the materials available on records



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14. The plaintiff had filed the suit claiming partition of 1/4 share in the plaint schedule property. The claim of the plaintiff is that the plaint schedule property is owned by her mother Saraswathi Ammal. The plaintiff and the defendants 1 and 3 are daughters and the 2nd defendant is the son of the said Saraswathi Ammal. The said Saraswathi Ammal died on 28.07.1994 and the plaintiff is entitled for 1/4 share in the plaint schedule property. Since the defendants are trying to sell the suit property, the plaintiff filed the suit for partition.

15. The first defendant filed written statement supporting the claim of the plaintiff. The second defendant filed written statement contended that his mother Saraswathi Ammal bequeathed her property through a registered Will dated 04.11.1987 in favour of him. After the death of Saraswathi Ammal, i.e., 28.07.1994, the Will came into force and the second defendant is in possession and enjoyment of the suit property. Hence, the plaintiff and the other defendants have no right to claim partition in the plaint schedule property.

16. On perusal of the records and the evidence, it is seen that the alleged Will, dated 04.11.1987 executed by Saraswathi Ammal, was marked as



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Ex.B.12 and the same is a registered one. To prove the Will, one Savarimuthu, who is the attesor of the Will, was examined as DW2. On perusal of the Will, it is noticed that it was executed on 04.11.1987 and registered on 09.11.1987. In that Will, life estate enjoyment was given to her husband. However, it is noticed that at the time of execution of the Will, the 2nd defendant, the beneficiary was minor. DW2, who is one of the attesor in the Will, deposed that Saraswathi Ammal had signed in the Will at every page and he had seen her signing and then, he signed in the Will followed by one Varadan. Scribe Ramalingam signed in the Will and Saraswathi Ammal had also seen the witnesses in the Will. Thereafter, the Will was registered and during the cross examination also he clearly deposed that Saraswathi Ammal had executed the Will in a sound disposing state of mind. He had also deposed that Saraswathi Ammal was suffering from Laccuvan, and her husband Thirumalai and her son Ramesh Babu, 2nd defendant accompanied her for presenting the Will for Registration at the Sub Registrar office .

17. On reading the evidence of attesor and the Will Ex.B.12, it is clear and proved that Ex.B.12 Will was executed by Saraswathi Ammal in a sound



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disposing state of mind. There is no suspicious circumstances surrounded the

Will and there is no reason to suspect that Saraswathi Ammal was not able to make and signed in the Will. The argument of the learned counsel for the appellant, that the Saraswathi Ammal not provided any share in the property to other children, is not creating a serious doubt. The second defendant/beneficiary was only minor at the time of execution of Ex.B.12 Will and there is no chance of influencing his mother to execute the Will. At the time of execution of Will, her husband i.e., father of the plaintiff was alive and Saraswathi Ammal given life estate to him and only after his death, the second defendant has got the absolute right in the property. In the Will, Saraswathi Ammal clearly instructed her husband to conduct the marriage of her two daughters. The plaintiff (P.W.1) during the evidence and pleadings stated about the ignorance of the existence of the Will. From the evidence, it is noticed that the plaintiff was staying with her parents upto 1992, and when her mother died in the year 1994, she was married. It is clear from her evidence that the Will, Ex.B.12 was executed before her marriage while she was residing with her parents. Therefore, her ignorance about the Will cannot be accepted. The second defendant constructed a house in the suit property in the year 2006. The second defendant examined himself as DW1. In his evidence, he has deposed about the Execution of the Will, which came into force after the death



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of his mother and father and also deposed that now he is in possession and enjoyment of the suit property. To prove the same, he has produced the property tax receipts, electricity receipts, which were marked as Ex.B.2 to Ex.B.9. The Trial Court and the First Appellate Court, on over all analysis of the evidence, found that Ex.B.12 Will is a genuine one and it was clearly proved by the defendants. After the death of Saraswathi Ammal and her husband Tthirumalai Chettiar Ex.B.12 has come into force and the suit property is now absolutely enjoyed by the second defendant. Therefore, the findings of the Trial Court as well as the First Appellate Court are only based on the evidence produced by the parties and no evidence is misconceived. There is no suspicious circumstances surrounded by the Will. The findings of the Courts below are not perverse or against law and there is no ground for interference. There is no merit in the Second Appeal. No substantial question of law involved in this case ad the second appeal is not maintainable.

18. In the light of the abovesaid factors, it is found that the Courts below, on a proper appreciation of the materials placed on record, and both oral and documentary evidence adduced by the respective parties and the principles of law governing the same, had rightly dismissed the suit and the substantial question of law formulated in the second appeal is, accordingly, answered



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against the plaintiff.

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19. For the aforesaid reasons, the second appeal fails and accordingly, is dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Index : Yes / No

Internet : Yes / No

25.07.2024

mrp

To

1.The Additional District Judge,
Fast Track Court No,
Salem.

2. The Principal Sub Judge,
Principal Sub Court,
Salem.



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V.SIVAGNANAM, J.

mrp

Pre-Delivery Judgment made
in S.A.No.1617 of 2011

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