



A.S.No.403 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.07.2024

PRONOUNCED ON : 23.10.2024

CORAM

THE HONOURABLE **MR.JUSTICE K.KUMARESH BABU**

A.S.No.403 of 2018
CMP.No.10654 of 2018

P.Manikandan ... Appellants/1st defendant
Vs

1.P.A.Gokulmani ... Plaintiff/Respondent
2.P.Sowmini
3.K.Gandhimathi
4.M.Jeeja ... Respondents/Defendants 2 to 4

PRAYER: This First Appeal has been filed Under Section 96 of CPC against the judgment and decree dated 19.12.2017 made in O.S.No.122 of 2011 on the file of I Additional District and Sessions Court, Coimbatore.

For Appellants : Mr.P.Saravana Sowmiyan

For Respondents : Mr.P.Ravi Shankar Rao for R1

Mr.L.Mouli for RR3 & 4

No Appearance for R2



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JUDGMENT

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This instant appeal had been preferred by the aggrieved first defendant against the trial court judgment and decree wherein the will dated 04.02.1999 was declared valid and disposed of the suit reiterating that the plaintiff and defendants 1,3 and 4 are entitled for equal share after the life time of second defendant in the suit schedule property. For easy reference, parties are referred as per their rank in the original suit.

2. The facts which lead to the present appeal is succinctly narrated hereunder. One Late.Appu purchased the suit schedule property in the year 1955 through a registered sale deed. The said Appu died intestate on 21.02.2001, leaving behind his wife/second defendant, his son/first defendant and three daughters/plaintiff and defendants 3 and 4. The first and second defendant refused to share the suit schedule property with the plaintiff. Therefore, the plaintiff filed a suit for partition seeking to allot 1/5th share in the suit schedule property against the other legal heirs of Late.Appu. The first and second defendant denied the claim of the plaintiff and submitted that late.Appu had executed a will on 17.03.1999 bequeathing the suit property to the first defendant and life interest to the second defendant. The third and fourth defendant initially admitted that



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their father died intestate. But in an additional written statement they claimed that their father late.Appu executed a will on 04.02.1999 just 40 days before the execution of the will in favour of the plaintiff and questioned the genuinity of the will dated 17.03.1999.

3. Considering the pleading and evidence available before the Trial Court, the following issues were framed by the Trial court to reach finality,

- a)Whether the will dated 17.03.1999 is true, valid and binding on the defendants?
- b)Whether the plaintiff is entitled for partition and 1/5th share in the suit properties?
- c) What other relief the plaintiff is entitled for?

Additional Issue:-

Whether the will dated 04.02.1999 is the last testament of Appu, father of the plaintiff and defendants 1,3,4?

4. On perusal of the facts and evidence submitted by both the parties, the Trial Court disposed of the suit that the will dated 04.02.1999 is valid



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and the plaintiff, and the defendants 1, 3 and 4 are entitled for equal share after the life interest of 2nd defendant.

5. Heard, Mr.P.Saravana Sowmiyan, learned Counsel for the Appellant, Mr.P.Ravi Shankar Rao, learned Counsel for the First Respondent and Mr.L.Mouli, learned Counsel for Respondents 3 and 4.

6. Mr.P.Saravana Sowmiyan, learned Counsel for the Appellant would contend that the suit schedule property was a self acquired property of late.Appu. During his lifetime, late.Appu wrote his last testament dated 17.03.1999 by giving life interest to his wife/2nd defendant and absolute interest in favour of the first defendant, revoking the earlier will dated 04.02.1999 for the reasons best known to him. He submitted that the plaintiff never approached the first defendant for share in the suit property. He further contends that the plaintiff already knew about the will B1, but in order to get share from the suit property made a false statement in the suit and filed a suit for partition.

7.He vehemently contend that the trial court erred in holding that the will dated 04.02.1999 is valid without a specific prayer to that aspect and failed to take note that the will dated 04.02.1999, Ex.B13 was not proved as



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to the Stipulation of Section 68 of Indian Evidence Act, 1872. He put forth that mere admission of execution of the will by the first defendant cannot make a will valid, without examination of at least one witness as to the execution of the will which is unlawful and such will cannot be taken as evidence in the eyes of law. Further, he contends that the attested copy of the will alone was marked without assigning any reason for non filing of the original will which leads to vitiation. Further, the third and fourth defendants, who admitted that their father was suffering from paralysis, urinal disease and he was taking continuous treatment from 1995 onwards and lost both eyes sight by 1998 failed to explain their father's capacity of physique and mind while executing will dated 04.02.1999, Ex B13.

8. He further puts forth that on the other hand the trial court resisted to admit the will dated 17.03.1999 though the execution of the will was proved by the examination of the attestors of the will as DW2 and DW3 and went wrong in not accepting the will as evidence. Further, though the plaintiff was well aware about the will even before filing of the suit, the plaintiff failed to seek for the declaration of the will dated 17.03.1999 as null and void.



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9. He further contends that minor discrepancies in the evidence of the attestors will not affect the genuineness and validity of the Ex B1, and the trial court would not have ignored the deposition of attestors on flimsy grounds . When once the will was proved by its execution then it is for the plaintiff to disprove it on the ground that it is obtained by coercion and influence. He further contends that the first defendant already shifted his onus of proof on the plaintiff. But the trial court erroneously held that the will dated 17.03.1999 was made under suspicious circumstances on mere presumption that it would be genuine since no reason had been advanced by the first defendant as to why Ex B1 was executed within 40 days after execution of Ex B13. He further contends that it is the prerogative right of the testator to execute will on his own as per his wish. Further, mere non examination of the second defendant is not fatal to the case of the first defendant.

10. He mightily set forth that the decree disposed of the suit on the basis of attested copy of the will dated 04.02.1999 holding that the will is valid in the absence of specific prayer to that is highly illegal and he prays for the interference of this court to set aside the decree and allow the appeal.



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11. Countering the arguments of the learned Counsel for the Appellant, Mr.P.Ravi Shankar Rao, learned Counsel for the first respondent contend that their father late.Appu acquired the suit schedule property in the year 1955 through a registered sale deed. The late.Appu died intestate on 21.02.2001 leaving behind the parties to the suit as his surviving legal heirs. The legal heirs are the successors to acquire the suit schedule property. The plaintiff refrained to claiming for partition of the suit property till the lifetime of their mother. But, the mother, second defendant who stated that the suit schedule property belongs to the first defendant, therefore neither plaintiff nor third and fourth defendant have any right over the same, agitated the plaintiff to file the suit for partition. He further contends that the plaintiff caused legal notice dated 07.02.2011 which was initially refused and replied by the first and second defendant through a reply notice dated 15.02.2011.

12. He vehemently submitted that by the reply notice alone the plaintiff came to know about the will in favour of the first defendant and it is not correct that she was aware about it earlier itself. Further, the first defendant used to roam around without any work. Hence, the father would



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not have executed the will in favour of the first defendant and the will was not executed with free state of mind. Moreover, the testator was more affectionate towards the daughters and he would not have discriminated against them. The testator was under continuous treatment from the year 1995 and he lost both his eyesight by 1998. Further he was unable to do his work since 1997 due to a paralytic attack. Therefore, the will might have been obtained by coercion or fraud or undue influence and it will not bind the right of the plaintiff. Further, it is not true that the first defendant had educated the plaintiff and conducted marriage for the third and fourth defendants.

13. He further puts forth that the attesting witnesses have not substantiated the requirement under law that the will was executed voluntarily and they have given deposition contradictory to each other. Hence, the evidence of DW2 and DW3 cannot be believed for the reason that there are several contractions in their evidence especially on the health condition of testator Appu. Moreover, the first defendant had already admitted the execution of the will dated 04.02.1999. He relied upon an Apex Court Judgment in Murthy Vs C.Saradambal reported in 2022 (3) SCC 209, wherein the appellate court order is reversed and confirmed the



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trial court order and held that, intention of testator to make testament must be proved, and propounder of will must examine one or more attesting witnesses and remove all suspicious circumstances with regard to execution of the will. Therefore, the trial court rightly held that the will dated 17.03.1999 was executed under suspicious circumstances and the first defendant right over the suit schedule property cannot be relied upon it and further held that the will dated 04.02.1999 is valid and thereby crystallised the rights of the parties is good in the eyes of law and requires no interference of this court and prays to confirm the trial court decree.

14. Mr.L.Mouli, learned counsel for the Respondent 3 and 4 contends that the third and fourth defendants sail along with the plaintiff. He further contends that the first and second defendants have not chosen to mention as to what has prompted late Appu within 45 days to cancel the earlier will and to execute a fresh will. Further, the first defendant had not proved the will dated 17.03.1999 and the depositions of the DW2 and DW3 which are contrary to one another cannot be relied upon to prove the will. Therefore, the trial court rightly disposed of the suit holding that the will dated 04.02.1999 is valid and thereby crystallised the rights of the parties requires no interference of this court and prays to confirm the trial court decree.



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15. I have considered the rival submissions made by the learned counsels appearing for the respective parties and perused the materials available on records.

16. In the light of the submissions made on behalf of the counsels for both sides, the following issues emerge for my consideration in this appeal:-

- a) *Whether the Trial Court was right in disbelieving the Will dated 17.03.1999 marked as Ex.B.1*
- b) *Whether the Court below was right in accepting the Will dated 04.02.1999, which had been marked as Ex.B.13*

Issue No.(a)

17. The Court below had dealt with in detail by relying upon the evidence of DW-2 & DW-3, the Attestator of the Will under Ex.B.1. After extracting the deposition of DW-2 & DW-3 extensively the Court below had come to a conclusion that there has been a contradiction in the deposition of the said witnesses with regard to the execution of the Will. I had also perused the relevant portion of the said depositions. DW-2 in his



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cross examination by the plaintiff had categorically stated that on the date of execution of the Will i.e., on 17.03.1999, he was in good health and mental balance and he had also categorically admitted that the Testator had good eye sight and was not affected with paralysis. Similarly DW-3 had also stated that the Testator was in good health and mind set at the time of execution of the Will. The suspicion that had been arisen in the mind of the Trial Court is that in what manner the Will was prepared? According to DW-2, he was not aware as to how the Will was prepared and on whose instruction was prepared and further it was already ready, when he visited the Registrar's office along with Testator. But on the contrary the other Attestator DW-3 had categorically stated that the Will was prepared in the presence of the Testator, DW-2 and himself. He had also categorically stated that when the Testator had given the details for preparation of the Will & DW-2 was also present. This contradiction remained as such, as the first defendant had not chosen to re-examine either DW-2 or DW-3. This contradiction of the preparation of the Will, in the light of the admitted execution of Ex.B.13 Will, without any reasons which had been attributed for change of mind of the Testator creates a suspicion in the manner in which the second Will had been executed.



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18. There has also been no rebuttal of PW-2, the Doctor who was examined to prove that the Testator had been suffering from serious illness.

Even though the first defendant had claimed that the Testator had strained relationship with the plaintiff, third and fourth defendants, DW-3 had spoken otherwise. Further, the proximity in which the Ex.B13 & Ex.B1 were executed, there is no indication of change of mind of the Testator under Ex.B.1 to fall back on his decision under Ex.B.13. No evidence was produced by the appellant to substantiate that there had been a fall back in the relationship for Testator to revisit his Will under Ex.B.13. In such view of the matter, I do not find any infirmity or illegality in the findings arrived at by the Court below in holding that Ex.B.1 Will had not been stood to be proved, even though the DW-2 & DW-3 Attestator of the Will were examined.

Issue (b):-

19. Even though the learned counsel appearing for the appellant had vehemently contended that the Ex.B.13 had not been proved by examining any of the Attestator, the first and second defendants in their additional written statement had admitted to the execution of the Ex.B.13 by the Testator, but had only substantiated their claim by contending that Ex.B.1



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which was subsequent Will, would erase Ex.B.13. When Ex.B.1 had been held to be not proved as being executed under suspicious circumstances, it is an axiomatic under Ex.B.13 would stand resurrected. When the execution of the Ex.B.13 had been admitted by the first and second defendants, I am of the opinion that there is no necessity for examining the Attestators of the Will to prove the same.

20. The Trial Court had rightly held that Ex.B.13 had stood proved in view of the specific admission by the defendants 1 & 2.

21. For the aforesaid reasons, I do not find any reasons which warrants interference with the well considered judgment and decree of the Court below and in fine, the Appeal Suit fails and is accordingly dismissed. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

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Index: Yes/No
Speaking Order/Non Speaking Order
Neutral Citation: Yes/No
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K.KUMARESH BABU,J.

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