



S.A.No.548 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on : 13.03.2024

Pronounced on: 22.03.2024

Coram:

THE HONOURABLE Mr. JUSTICE P.B.BALAJI

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1. Periyammal,

2. Siva,

3. Dhanalakshmi,

... Appellants/Defendants 1, 10 & 11

/versus/

1. Valli,

2. Thangavel,

3. Ramamurthy,

... Respondent/Plaintiff/Defendants 2 & 7

Prayer: Second Appeal has been filed under Section 100 of C.P.C., against the decree and Judgment passed in A.S.No.21 of 2013, dated 13.06.2018 on the file of Subordinate Judge, Kallakurichi confirming the decree and Judgment of O.S.No.737 of 2006 dated 27.11.2012 on the file of the Hon'ble I Additional District Munsif Judge, Kallakurichi.

For Appellants : Mr.N.Manokaran,
for Mrs.A.Rajeswari Karthikeyan

For Respondent : Mr.R.Venkatesh



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JUDGMENT

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The defendants 1, 10 & 11 in a suit for partition are the appellants, challenging the concurrent findings rendered by the trial Court as well as First Appellate Court.

2. The parties are described as per their litigating status before the trial Court.

3. The case of the plaintiff that she is the daughter of Mari Adhikari and Periyammal. According to the plaintiff, the property belonged to her father, Mari Athikari and he died leaving behind his wife, the 1st defendant and son Thangavel, the 2nd defendant and daughter-in-law, Dhanalakshmi/11th defendant and grand children through said Thangavel being defendants 7 to defendants 10. He has also left behind 5 daughters, namely, the plaintiff and defendants 3, 4, 5 & 6.

4. It is the case of the plaintiff that since Mari Adhikari died interstate, she was entitled for a share in the suit property and since there was already a partition between Mari Adhikari and the 2nd defendant, namely, the



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father and brother of the plaintiff respectively, in the father's share, the 2nd defendant was not entitled to any share and consequently, father's share has to be divided amongst the wife/1st defendant, plaintiff and defendants 3 to 6.

5. The said suit was resisted by the defendants on the ground that Mari Adhikari had executed a *Will* in Ex.B.2 bequeathing his share to the children of his son Thangavel i.e., defendants 7 to 10. It is also contended that the daughters, excepting the plaintiff, namely, defendants 3 to 6 had executed a release deed in favour of their mother, Periyammal on 07.09.2006 and on the same day, the mother Periyammal executed a settlement deed in favour of grand the children, defendants 7 to 10 and therefore, the plaintiff was not entitled to any share and the suit was sought to be dismissed.

6. The trial Court decreed the suit, finding that the *Will* was not disclosed in the pre-suit reply notice Ex.A7 and also noticing inconsistencies in the evidence of the attesting witnesses, D.W.2 and D.W.3. The trial Court also found that the registered document, namely Ex.A.4 dated 07.09.2006 did not mention about the alleged *Will*. The trial Court also found that on a comparison of the left thumb impression in Ex.B.2 dated 06.01.2004, it was not matching



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with the admitted left thumb impression in Ex.B.1 partition deed between Mari

Adhikari and her son.

7. On appeal, the First Appellate Court confirmed the finding arrived at by the trial Court and dismissed the appeal filed by the plaintiff.

8. Aggrieved by the concurrent findings of the trial Court as well as the First Appellate Court, the plaintiffs have preferred the above Second Appeal.

9. On 01.02.2024, I have admitted the above Second Appeal on the following two substantial questions of law:-

"(i) Have not the Courts below committed an error in disbelieving the Will dated 06.01.2004 (Ex.B2) when the contesting defendants have proved the Will in compliance with Section 63(c) and Section 68 of the Indian Evidence Act?

(ii) Whether the suit for partition is maintainable in the absence of any challenge made to the settlement deed dated 07.09.2006 (Ex.B7) executed by 1st defendant in the name of the defendants 7 to 10?"

10. I have heard Mr.N.Manokaran, Learned Counsel for



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Mrs.A.Rajeswari Karthikeyan, Learned Counsel for the appellants and

Mr.R.Venkatesh, Learned Counsel for the respondents.

11. I have carefully considered the rival submissions advanced by the Learned Counsel on either side. I have also gone through the pleadings, oral and documentary evidence adduced by the parties and also the judgments of the trial Court and the First Appellate Court.

12. The fact that Mr.Mari Adhikari married Periyammal/1st defendant and they were blessed with a son, Thangavel/2nd defendant and daughters/defendants 4 to 6 and the plaintiff is not in dispute. It is also not in dispute that the 2nd defendant married the 11th defendant/Dhanalakshmi and they were blessed with four children, defendants 7 to 10. It is also an admitted fact that Mari Adhikari died on 13.08.2005. The suit has been filed on 09.10.2006.

13. It is the specific case of the plaintiff that being the daughter, she would be entitled to a 1/6th share and in view of the partition already effected between the 2nd defendant and the father Mari Adhikari, the 2nd defendant could not take an additional share in Mari Adhikari's half share and



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therefore, the plaintiff's entitlement would be a 1/6th share and not 1/7th share.

However, straight away, I am not in agreement with the said claim of the plaintiff. Admittedly, *dehors* the decision to be taken with regard to Ex.B.2 *Will*, despite the partition between the father and 2nd defendant/Thangavel. Consequent to the demise of the father Mari Adhikari, if found to be interstate, then the 2nd defendant would also be entitled to a share out of the share of the father, Mari Adhikari, being a class-I legal heir. The only question that remains is as to whether the *Will* Ex.B.2 is true and genuine and whether the defendants have proved the same as required under the Law.

14. Mr.N.Manokaran, Learned Counsel for the appellants would submit that D.W.2 and D.W.3 have been examined and the *Will* has been satisfactorily proved. The Learned Counsel for the appellants would take me through the evidence of the attesting witnesses and he would also state that the finding of the Courts that the non-disclosure of the *Will* in the pre-suit notice in Ex.A.7 cannot be put against the defendants because, in the said reply notice, there was no reference to even the registered documents namely, the release deed dated 07.09.2006 and the settlement deed executed by the grandmother/1st defendant, the wife of Mari Adhikari Periyammal on the same day in favour of defendants 7 to 10. The Learned Counsel would also state that the minor



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inconsistencies in the evidence of the attesting witnesses cannot be blown out of proportion, especially when evidence was being let in after a lapse of 7 years from the date of execution of the *Will* and Courts cannot expect proof of *Will* by arithmetical accuracy. He would further take me through the cross examination of P.W.1 where according to the Learned Counsel for the appellant, P.W.1 had admitted to the *Will* and therefore, he would state there is no necessity for proving the *Will* in view of Section 68 of Indian Evidence Act. In this regard, he would place reliance on the Division Bench of this Court in ***Boomathi -vs- Murugesan and others*** reported in ***MANU/TN/1250/2023***, where I was part the Bench and we held that when there is no dispute with regard to the *Will*, proof would not be warranted. He would further contend that the circumstances which were put against the defendants, surrounding the execution of the *Will* were not of such magnitude to disbelieve the *Will* and he would therefore pray for the concurrent findings to be set aside and the Second Appeal be allowed. He would also place reliance on the decision of the Hon'ble Supreme Court in ***Pentakota Satyanarayana and others -vs- Pentakota Seetharatnam and others*** reported in ***(2005) 8 SCC 67***, where the Hon'ble Supreme Court held that when the deposition was recorded after 17 years after registration of the *Will*, Courts below cannot make mountain out of a molehill and reject a duly executed registered *Will*.



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15. Per contra, Mr.R.Venkatesh, Learned Counsel for the respondents would submit that the Courts below have rightly granted a preliminary decree for partition, rejecting Ex.B.2 *Will*. Further, the Learned Counsel for the respondents would take me through the oral evidence of D.W.2 and D.W.3 and the inconsistencies in their evidence which would clearly establish that the *Will* was not a true and genuine document. He would also support the findings of the Courts below that if the *Will* had really been true and genuine document, actually executed on the said date, i.e., 06.01.2004, the defendants would have certainly referred to the *Will* in their reply notice in Ex.A.7 and claimed a right.

16. Further, the Learned Counsel for the respondents would also state that the defendant had approached the Court as if even the plaintiff has executed a release deed in favour of the 1st defendant, which was rightly negatived by both the Courts, as absolutely no proof was forthcoming on the side of the defendants to establish the same. He would also point out that a new case projected by the defendants which has been referred to by the First Appellate Court, where after the suit was decreed, the defendants projected a different version all together as if on 11.03.2003, the plaintiff had executed an



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unregistered release deed and same was sought to be marked by way of additional evidence in I.A.No.3 of 2014. The said application was dismissed and same was not challenged by the defendants by way filing a revision. The Learned Counsel for the respondents would also place reliance on the following judgments:-

(i). *Kalyan Singh London Trained -vs- Smt.Chhoti and others* reported in *1990 SCC (1) 266*.

(ii). *Dhanulal and others -vs- Ganeshram and another* reported in *(2015) 12 SCC 301*.

(iii). *P.Sasikala -vs- Smt.Chandra and others* reported in *MANU/TN/0895/2017*.

17. In *Kalyan Singh London Trained's* case referred above, the Hon'ble Supreme Court held that when the *Will* had not been produced for very many years before the Court or public authorities, even though there were occasions to produce it for asserting title of the property, it would amount to a suspicious circumstance and the propounder had to place satisfactorily material to remove such a suspicious circumstance.



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18. In *Dhalunlal's* case referred above, the Hon'ble Supreme

Court held that execution of a *Will* does not mean mechanical act of signing the document or getting it signed, but an intelligent appreciation of the contents of the document and signing it in token of acceptance of the document and further, held that there must be a clear evidence of the attesting witnesses or other witnesses that the contents of the *Will* were read over to the executant and he, after admitting the same to be correct, puts his signature in presence of the witnesses. It is only after the executant puts his signature, the attesting witnesses shall put their signatures in the presence of the executant.

19. In *Sasikala's* case referred above, the Hon'ble Supreme Court

held that when there are suspicious circumstances, the same will have to be dispelled by the propounder. The Learned Counsel for the respondents would therefore pray for dismissal of the Second Appeal.

20. As already mentioned herein above, the only point that requires

consideration is as to whether Ex.B.2 *Will* has been proved. I shall first deal with the argument of the Learned Counsel for the appellants that the plaintiff has admitted to the execution of the *Will*. In the plaint, there was no occasion for the plaintiff to speak about the *Will*, since for the first time, only in the



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written statement, the defendant has brought up the factum of the execution of the alleged *Will* by the father Mari Adhikari. With regard to the oral evidence, the plaintiff examined herself as P.W.1 and in view of the chief examination in chief, she has categorically and specifically denied the truth and genuineness of the alleged *Will* dated 06.01.2004. However, in cross examination, she had stated that under a *Will* dated 06.01.2004, her father has bequeathed the suit property to defendants 7 to 10. However, on the next date of cross examination, she has categorically denied that her father executed any *Will* in favour of the defendants 7 to 10 and that only under the settlement deed executed by her mother the defendants 7 to 10 are enjoying the suit property. The evidence of the plaintiff has to be read as a whole and should not be dissected into isolated parts. It is the specific case of the plaintiff that the father died interstate and that is why she approached the Court seeking partition and separate possession of her 1/6th share. Only by way of written statement, the defendants had pleaded that the father had executed an unregistered *Will* and thus, disinherited the plaintiff. The isolated admission of P.W.1 cannot be taken as material admission on her part in order to use it against the plaintiff and dismiss the suit in *toto*. It is also not known as to whether the suggestion put to P.W.1 was showing Ex.B.2 *Will*. Unfortunately, the trial Court has recorded only the answers and not the questions. Thus, her admission that



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under Ex.B.2 *Will*, the father had bequeathed the properties to the defendants 7

to 10 cannot be used against the plaintiff to non-suit her and deny the relief of partition. Therefore, I am unable to accept or countenances the submission of Mr.N.Manokaran, Learned Counsel for the appellants that the plaintiff having admitted the execution of the *Will*, there is no requirement for proof of the *Will* under Ex.B.2, in view of Section 68 of the Indian Evidence Act. The decision in ***Boomathi's*** case referred above will also have no bearing in the present case since there was specific and definite admission even in the pleadings with regard to the *Will* and in such circumstances, we had held that if do not require further proof.

21. Coming to the aspect of proof of due execution and attestation of Ex.B.2 *Will*, it is seen from the evidence of D.W.2 and D.W.3 that the *Will* was executed in a Forest Village house. There is inconsistency in the oral evidence of D.W.2 and D.W.3, where one of the witnesses says that the *Will* was a registered *Will* and the other witness says that the *Will* was unregistered. Further, the *Will* is a typed *Will* and there are clear references in their evidence as to the *Will* having been written and it is not substantiated as to how the *Will* came to be typed and brought to the Forest Village house. Even though, as rightly contended by the Learned Counsel for the appellants, Mr.N.Manokaran,



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the witnesses are entering the witness box after lapse of 7 years, there is bound

to be some inconsistency in their evidence and they cannot be expected to speak with mathematical precision. However, when the two witnesses have spoken about the execution and attestation of Ex.B.2 *Will* and there are gaping inconsistencies with regard to even material aspects surrounding execution and attestation of the *Will*, regarding the *Will* having been written not typed and especially, with P.W.2 stating that the *Will* was hand written in by one Mr.Govindharajan and he was also not examined. One of the witness states that the *Will* was not read over to the testator, but the other attesting witness states that the *Will* was read over. More over, I find from the evidence of attesting witnesses that even the basic requirement of Section 63(c) of Indian Succession Act has not been complied with. In the chief examination, excepting for stating that the testator has affixed his left thumb impression in their presence, the other requirements which are necessary namely, the testator signing in the presence of the attesting witnesses and the testator being in sound and disposing state of mind and memory are conspicuously absent. Even though a suggestion is put regarding the testator witnessing the attestation, I find from the *Will* that the testator himself has mentioned that his health is failing and therefore, he has decided to execute the *Will*. In such circumstances, it was absolutely necessary for the propounder also the attesting witnesses to



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speaking about the mental capacity of the testator. There is absolutely no shred of evidence to state that the testator was in a sound and disposing state of mind, memory and understanding at the time of execution of the *Will* Ex.B.2. Thus, from all the above circumstances viewed in a cumulative manner, it is clear that due execution and attestation has not been proved in accordance with law and Ex.B.2 *Will* cannot be upheld to deny the right of partition to the plaintiff.

22. Though, the plaintiff had claimed $1/6^{\text{th}}$ share on the ground that the 2^{nd} defendant would not be entitled to any share, having already effected a partition with his father, the trial Court rightly granted a decree of $1/7^{\text{th}}$ share and same was also rightly confirmed by the First Appellate Court.

23. I am also unable to countenance the submissions of the learned Counsel for the appellants that non-mentioning of the *Will* in reply notice could not be fatal. Admittedly, when a claim for partition in a valuable immovable property is claimed by one of the daughters, the first defence to such claim would have been under the *Will* Ex.B.2. Strangely, it is not even known as to why, after having executed Ex.B.2 *Will*, the sisters of the plaintiff had executed a release deed in favour of their mother, who in turn executed a release deed in favour of defendants 7 to 12, who had already benefited and



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become entitled to the suit property under the *Will* Ex.B.2. This coupled with

the fact that the defendants have also set up a case that the plaintiff herself had released her share by receiving Rs.60,000/- from her father and executed a release deed dated 22.02.1998, and the said plea of release having not been established by producing the alleged release deed dated 21.02.1998, to non-suit the plaintiff, the case of the appellants has to be rejected. This apart, even before the First Appellate Court, the defendants had come up with a totally different story, as if, the plaintiff had released her right on 11.03.2003. Even though, there was an attempt to produce the alleged release deed executed by the plaintiff, in favour of father Mr.Mari Adhikari, the First Appellate Court rejected the same and there has been no further challenge to the said order and no specific grounds have also been raised invoking Section 105 of Civil Procedure Code and therefore, the case projected by the defendants that the plaintiff had released her share in favour of her father, Thiru.Mari Adhikari is wholly unsustainable. Thus, it can be seen that the conduct of the defendants has only been to deny the plaintiff, her entitlement in the suit property. First, they set up a *Will* and it appears that the *Will* has been created after the exchange of notices and that is the reason why there is no whisper about the alleged *Will* in the reply notice Ex.A.7. Even in registered document, namely, release deed by the sisters of the plaintiff to the mother of the first defendant,



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also there is no whisper about the *Will* and even in the consequent settlement deed executed by Ex.B.1 in favour of the defendants 7 to 10, grandchildren also there is no mention about the alleged *Will*. Therefore, the argument of the Learned Counsel for the respondents appears to be probable that the *Will* has been created only after the reply notice in Ex.A.7 and for the first time projected by way of written statement in the claim for partition.

24. Hence, I do not find any justifiable grounds warranting interference with the well merited findings of the Courts below, especially when they have based their decision on available materials, pleadings, as well as oral and documentary evidence.

25. In fine, the substantial questions of law are answered against the appellants and the *Second Appeal is dismissed*. No costs.

22.03.2024

Index :Yes/No.
Internet :Yes/No.
Neutral Citation :Yes/No.
Speaking Order/Non-Speaking order.
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Copy to:-
1. The Subordinate Judge, Kallakurichi.



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2. The I Additional District Munsif Judge, Kallakurichi.

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P.B.BALAJI, J.

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Pre-delivery judgment made in
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