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S.A.No.532 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.01.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.B.BALAJI

S.A.No.532 of 2020
&
C.M.P.No.19372 of 2023

D.Johnson Jayakumar

... Appellant

Vs.

D.Nelson Vimalkumar

... Respondent

PRAYER: The Second Appeal is filed under Section 100 of the Civil Procedure Code to set aside the decree and judgment made in A.S.No.25 of 2016 dated 06.01.2020 on the file of II Additional District Judge, Vellore at Ranipet confirming the judgment and decree in O.S.No.63 of 2009 dated 08.08.2016 on the file of the Subordinate Judge, Ranipet, Vellore District.

For Appellant : Srikrishna Bhagavat

For Respondent : Mr.T.S.Baskaran

J U D G M E N T

The unsuccessful defendant in a suit for partition is the appellant. The suit



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was initially instituted by the appellant's brother as plaintiff, claiming half share in the suit property. The parties are Indian Christians.

2. The case of the plaintiff before the Trial Court is that the property was purchased by the mother Rajam Dhanapaul under a registered sale deed dated 14.09.1972 in Doc.No.2020 of 1972. SRO, Walajah. The further case of the plaintiff is that the mother died on 18.06.1979, intestate, leaving behind her husband Dhanapaul, the plaintiff and the defendant as her only legal heirs to succeed her estate. Subsequently, the father Dhanapaul also died intestate on 30.05.1997, leaving behind the plaintiff and the defendant alone as the only legal heirs to succeed to his estate. According to the plaintiff, the suit property has been in the joint possession and enjoyment of the plaintiff and the defendant and claiming a one half share belonging to the plaintiff, the suit was instituted, after a lawyer's notice being issued on 14.03.2009, to which there was no reply notice issued by the defendant.

3. The defendant filed a written statement stating that though the mother died intestate, the father had executed a registered Will dated



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11.10.1993, and registered as Doc.No.114 on the file of SRO, Wallajah and

therefore resisted the claim of the plaintiff that the plaintiff was entitled to 50%.

The defendant further contended that the plaintiff was employed and living in Chennai from 1972 and that he neither lived in the suit property nor contributed any money to purchase the suit property or the adjacent property as claimed in the plaint. The father Dhanapaul died on 30.05.1997 and on his demise his last Will and Testament came into effect and therefore the plaintiff cannot claim a one half share in the suit property. Further, by his own conduct, the plaintiff has ousted all his rights in the suit property. Further, the Will also was taken out from the bank locker in the presence of the plaintiff and plaintiff was fully aware of the fact that the father had executed his last Will and testament. The defendant therefore prayed for dismissal of the suit.

4. Before the Trial Court, the plaintiff examined himself as P.W.1 and exhibited Exs.A1 to A.22 on his side. On the side of the defendant, he examined himself as D.W.1 and one of the attesting witnesses to the Will, by name Balu as D.W.2. On the side of the defendant Exs.B1 to Ex.B.12 were marked. The Trial Court, on considering the pleadings of the parties and



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evidence adduced, held that the Will was not proved and the defendant also did not establish his plea of ouster or adverse possession and proceeded to decree the suit as prayed for by the plaintiff and granted a preliminary decree in favour of the plaintiff. The defendant on Appeal in A.S.No.25 of 2016 before the II Additional District Judge, Vellore, challenged the judgment and decree of the Trial Court on the grounds that the Will Ex.B-5 dated 11.10.1993 was a registered Will and the Trial Court had failed to consider the fact that the Will was taken out from the bank locker after the demise of the father and in the premise of the plaintiff and therefore the plaintiff is fully aware of the factum of execution of the Will and that the Trial Court failed to see that the suit property was being maintained only by the defendant by paying all house and water taxes and charges and the Trial Court proceeded as if the parties were Hindus and did not even advert to the admitted facts viz., the parties being Christians and governed by the Indian Succession Act and not by the Hindu Succession Act. The appellant further contended that even otherwise being in continuous possession and uninterrupted possession, the defendant had all right and title to the Suit property, by adverse possession or ouster.



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5. The Appellate Court, after framing the points for consideration, proceeded to discuss the pleadings and evidence of the parties and came to the conclusion that the evidence of D.W.2 was insufficient in order to prove or establish the Will set up by the defendant in Ex.B5 to deny the half share of the plaintiff. The Appellate Court also held that D.W.2 was a stock witness/payment witness of the document writer Parthasarathi and proceeded to concur with the findings of the Trial Court with regard to the proof and due execution of the Will Ex.B5. That apart, the First Appellate Court also held that the defendant's contention that the very right of the plaintiff stood ousted by long continuous uninterrupted and peaceful possession of the suit property at the hands of the defendant did not merit acceptance and that the plaintiff was in constructive possession of the suit property, being a co-sharer and therefore rejected the plea of adverse possession/ouster and ultimately dismissed the Appeal confirming the preliminary decree for partition.

6. This Court while admitting the Second Appeal on 12.10.2020 has framed the following substantial questions of law:

*“1. Whether the Courts below were right
in disbelieving the evidence of D.W.2, the attesting*



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witness, on the ground that he did not know the contents of the Will?

2. Whether the Courts below were right in granting half share to the plaintiff when the father had, under the Will, bequeathed his share to the appellant/defendant?"

7. Heard Mr.Srikrishna Bhagvat, learned counsel for the appellant/defendant and Mr.T.S.Baskaran, learned counsel for the respondent/plaintiff.

8. For the sake of convenience, the parties are described as per their rank in the Trial Court.

9. The learned counsel for the appellant would attack the findings of the Courts below that the Trial Court had not even discussed the issues on hand, keeping in mind that the parties were Indian Christians and proceeded to dispose of the suit as if it was a suit for partition laid claiming rights under the provisions of the Hindu Succession Act and that the parties were Hindus and not Indian Christians. In so far as the Appellate Court, he would submit that the



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evidence of D.W.2 has been disbelieved only on the ground that he had stated in cross examination that he did not know the contents of the Will. He would therefore contend that as an attesting witness D.W.2 need not know the contents of the Will and his evidence was required only to prove the due execution and attestation of Will and according to the learned counsel for the appellant, the evidence of D.W.2 fully satisfied and complied with the mandate of the Sec.68 of Indian Evidence Act, 1872. The learned counsel did not seriously canvass the points of ouster and adverse possession which have been rejected by the Courts below concurrently.

10. Learned counsel for the respondent/plaintiff would submit that the evidence of D.W.2 is the crucial aspect which would answer the substantial questions of law and he would take me through the chief examination of D.W.2 the attesting witness and also his cross examination. According to the learned counsel for the respondent, was in the evidence in chief of D.W.2, the attesting witness does not even satisfy the basic requirements of Sec.68 of the Indian Evidence Act r/w. Sec.63 of the Indian Succession Act. He would therefore pray for dismissal of the Second Appeal as the Courts below had rightly



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disbelieved the Will on the ground that the defendant had failed to prove the truth and genuineness of the Will in the manner known to law and further the parties viz., the plaintiff and defendant being brothers, they are entitled to one half share in the suit property.

11. Having paid my anxious careful consideration to the rival contentions advanced by both the counsel and in answer to the substantial questions of law. I proceed to discuss the material facts of the case as hereunder:

Though the first substantial question of law is as to whether the evidence of attesting witness D.W.2 could have been disbelieved on the ground that he did not know the contents of the Will, I find from the evidence of D.W.2 as well as on a reading of the judgment of the Trial Court as well as the First Appellate Court that the Courts have not disbelieved the evidence of D.W.2 on the ground that he did not know the contents of the Will. In fact, the First Appellate Court has extracted the evidence in Chief as well as cross examination of D.W.2 and found that D.W.2 did not know anything about execution of Ex.B5 Will by father Dhanapaul and the he signed the Will only at



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the behest of the Document Writer one Mr.Parthasarathy. Only on this basis, the Will has been held to be not proved and it is not as if the Courts below had rejected the evidence of D.W.2 on the ground that he did not know the contents of the Will. Thus, I have no hesitation to answer the first substantial question of law against the appellant and in favour of the respondent.

12. In so far as the second substantial question of law regarding the share of the plaintiff, factoring the Will executed by the father and on an independent reading of the oral and documentary evidence adduced by the parties and also on perusal of the original registered Ex.B5-Will, I find that the Will is dated 11.10.1993 and it has been executed by the father of the parties viz., Mr.Dhanapaul in the presence of two witnesses, A. Ameer Basha and T.Balu. The second attesting witness has been examined as D.W.2. The said Will was also registered as Doc.No.114 of 1993 on the same day before the Sub Registrar, Wallajah. However, the second attesting witness who was examined as D.W.2 did not sign at the Registrar's office as an identifying witness. The identifying witnesses before the Sub-Registrar's office were the first attesting witness viz., A.Ameer Basha and one another independent witness by name,



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C.N.Subramani.

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13. The Indian Evidence Act requires proof of a Will in accordance with Sec.68 and r/w. Sec.63 of the Indian Succession Act. The attesting witness should speak about the execution of the Will by the testator, in his presence and in the presence of the other attesting witness and further also with regard to the attestation by himself and the other witness, in the presence of the testator. In this regard, the evidence of D.W.2 especially chief examination hardly satisfies even the basic requirements of the statute. D.W.2 has merely stated that he has signed the Will after the testator signed the Will. Further, he was not even able to state anything about the attestation by the first attesting witness and in fact he stated that he was not in a position to recollect as to how many witnesses signed in Ex.B5. Even with regard to a question whether the Will was typed or handwritten, he was not able to answer the said question and he has only stated that he is unable to recollect. He further stated that he saw the testator only at the Sub-Registrar's office and he signed the Will as he was asked to do so. In cross examination, he has stated that scribe Parthasarathi is known to him and that only at the request of said Parthasarathi he signed the Will. He further stated that he does not know the testator and had not seen him before. He is not



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even in a position to recollect as to whether the scribe has signed the Will or not, despite the fact that Ex.B5-Will was very much available before him during the time of trial and he cannot plead ignorance of the fact of execution as well as attestation of the Will.

14. The evidence of D.W.2 does not inspire the confidence of the Court to hold Ex.B5-Will to be true and genuine. The suit has been filed by the brother of the appellant seeking partition. The only plausible defence setup by the appellant/defendant is that the father executed a Will and further the plaintiff having moved to Chennai, had virtually ousted his rights in the suit property and the property has been maintained only by the defendant paying all taxes and charges including obtaining patta in his name and therefore the claim of the plaintiff had to be negated.

15. I am unable to accept the said argument of the learned counsel for the appellant for the simple reason that a person setting up the Will to defeat the lawful share of the plaintiff, but for the said Will, has to necessarily not only plead but also prove and truth and genuineness of the said Will under which the



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rights of the plaintiff are sought to be taken away. Further, learned counsel for the respondent would also invite my attention to the contents of the Will. The Will proceeds on the basis that the property was the property of the father, though admittedly the property was purchased by the mother who had independent source of income. The parties admit that their mother was a teacher and had sufficient income to purchase the suit property. The father had also not given the property to the defendant in entirety. He has only imposed a condition that the property was worth Rs.5,00,000/- and that his desire was that the defendant should take the property by paying Rs.1,80,000/- to the plaintiff. Even assuming that the father had a right to execute a Will in respect of his 1/3rd share alone, being the spouse, under the provision of Indian Succession Act, as survivor, taking 1/3rd and the remaining to the legatees, in order to establish that 1/3rd share of the father was bequeathed to the defendant, the defendant had to necessary establish the Will in Ex.B5. The evidence is totally lacking and does not meet the required mandate and provisions of law. I do not find that the Courts below have rendered any perverse or illegal findings in this regard. They have rightly assessed the evidence of D.W.2 and come to a conclusion that Ex.B5- Will was not proved in a manner known to law.



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Consequently, the substantial question of law is also answered against the appellant and in favour of the plaintiff.

In fine, the Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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Internet:Yes
Index:Yes/No

To

- 1.The II Additional District Judge, Vellore at Ranipet
- 2.The Subordinate Judge, Ranipet, Vellore District



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P.B.BALAJI,J

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