



S.A.No. 864 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 27.03.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No. 864 of 2021

&

C.M.P. No. 16505 of 2021

1.Kullammal

2.Bakthavatsalam

...Appellants

Vs.

1.Sekar

2.Sumathi

3.Egambaram

...Respondents

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 03.09.2018 in A.S.No.41 of 2014 on the file of the Additional District Court / Fast Track Court, Villupuram reversing the Judgment and Decree dated 03.07.2014 in O.S.No.93 of 2010 on the file of the I Additional Sub Court, Villupuram.



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S.A.No. 864 of 2021

For Appellants : Mrs. R.Meenal

For Respondents 1 & 2 : Mr. N.Manokaran

For Respondent 3 : No appearance.

J U D G M E N T

The defendants are the appellants before this Court challenging the Judgement and Decree passed by the Additional District Court (Fast Track Court), Villupuram in A.S.No.41 of 2014, in and by which the learned Judge has reversed the Judgement and Decree passed by the I Additional Subordinate Judge, Villupuram in O.S.No.93 of 2010. The facts necessary to dispose of the Second Appeal are briefly set out herein below and the parties are referred to in the same ranking as before the Trial Court.

2. The plaintiffs have filed the above referred suit for partition of the 1st plaintiff's half share in the suit schedule property. The 1st plaintiff and the 1st defendant are siblings and daughters of the



deceased Govindasamy. The 2nd and 3rd plaintiffs are the children of the 1st plaintiff and the 2nd and 3rd defendants are the sons of the 1st defendant.

3. It is the case of the plaintiffs that the property belonged to the said Govindasamy, he having purchased Item nos.1 to 3 from his brother Arumuga Padayachi, out of his own self earnings under a sale deed dated 17.08.1950. The 4th item of the suit schedule property was settled on the said Govindasamy by his mother Thanjammal, under a registered settlement deed dated 28.07.1950.

4. The plaintiffs would contend that the said Govindasamy had mortgaged the property in favour of his brother, Arumuga Padayachi after borrowing a sum of Rs.2,000/- from him. The said Govindasamy had died nearly 35 years ago and after his death, the 1st plaintiff and the 1st defendant had redeemed the property. The plaintiffs would submit that the 1st plaintiff and the 1st defendant were in joint



possession of the 4th item of the property. The 1st defendant was residing in one portion having tiled house. Likewise, the 1st plaintiff was in possession and residing in another portion, where, she has put up a thatched hut. The electricity service connection in respect of this house is in the name of the 1st plaintiff's mother Dhanalakshmi.

5. The plaintiffs would submit that the 1st defendant who was cultivating the lands for and on behalf of the 1st plaintiff had been sharing the income with the 1st plaintiff. However, all of a sudden it was stopped. Therefore, the plaintiffs had issued a legal notice dated 12.12.2010 calling upon the 1st defendant to partition the property. To the shock and surprise of the plaintiffs, the defendants had sent a reply contending that the said Govindasamy, on 09.08.1967, in a sound disposing state of mind had executed a Will. Under the Will, he had given life estate to his wife Dhanalakshmi without giving her any right to alienate or encumber the property. After her lifetime, the property was to be enjoyed by his daughters. The said Govindasamy had



divided the properties into A and B schedule properties. The A schedule property was allotted to the 1st defendant and the B schedule property was allotted to the 1st plaintiff. Both the 1st defendant and the 1st plaintiff were to enjoy the property for their life time and after their demise, the property was to devolve on their male heirs.

6. The plaintiffs would deny the execution of this Will. It is their contention that when the 1st plaintiff had gone to stay with the 2nd plaintiff, her house was demolished by defendants and thereafter they had not allowed her to re-enter the suit schedule property. Therefore, left with no other alternative, the plaintiffs have come forward with the above suit.

7. The only contention raised in the written statement of the defendants is that the said Govindasamy had executed a Will on 09.08.1967 giving life interest to his wife and daughters. Thereafter, the properties were to devolve only on the male heirs of the 1st



defendant. Therefore, they sought for the dismissal of the suit.

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8. The Trial Court had framed the following issues:

“1. Whether Govindhasamy father of the 1st plaintiff and the 1st defendant died intestate or a Will dated 09.08.1967 as alleged in the written statement?

2. Whether the alleged Will is fabricated and forged one as alleged in the plaint?

3. Whether the 1st plaintiff is entitled for ½ share in the suit properties?

4. Whether the 1st plaintiff is entitled for Judgement and Decree as prayed for?

5. To what relief? ”

9. The 2nd plaintiff examined himself as P.W.1 and marked



Ex.A.1 to Ex.A.12 and the 3rd defendant examined himself as D.W.1 and marked Ex.B.1 to Ex.B.4.

10. Ultimately, on considering the evidence, the Trial Court had proceeded to dismiss the suit. Aggrieved by the said Judgement and Decree, the plaintiffs had filed A.S.No.41 of 2014 on the file of the Additional District Court / Fast Track Court, Villupuram.

11. The Lower Appellate Court had re-appreciated the evidence on record and allowed the appeal and decreed the suit. The Lower Appellate Court had observed that the defendants had not produced the original of the Will, Ex.B.1 and it was only a certified copy that was furnished. That apart, there is no pleading that the Will has been lost. However, in their cross examination, they would for the first time state that the original Will is lost. The Lower Appellate Court



observed that only if there is a proof that the original Will is lost, the certified copy could be accepted as a secondary evidence.

12. The Lower Appellate Court had observed that the provisions of Section 65 (c) of the Evidence Act had not been complied with. That apart, the defendants had not examined the attesting witness to Ex.B.1. Though the defendants would contend that the attesting witness are no more, they have not taken any steps as contemplated under Section 69 of the Evidence Act. Ultimately, the Lower Appellate Court proceeded to allow the appeal and set aside the Judgement and Decree of the Trial Court.

13. Aggrieved by the same, the defendants had filed the above Second Appeal.

14. Mrs. R.Meenal, learned counsel who argued on behalf of the defendants would submit that the Lower Appellate Court had failed to



appreciate that Ex.B.1 is a certified copy of the Will, which would clearly prove the execution of the Will as the same is registered in the presence of the Sub Registrar. She would submit that the Lower Appellate Court has erred in brushing aside Ex.B.1 only on the ground that the original has not been marked. She would further submit that the Lower Appellate Court has totally lost sight of the fact that the plaintiffs have filed this suit for partition nearly 35 years after the demise of their father. There is no explanation as to why there has been such a delay. Therefore, the learned counsel prayed this Court to allow the Second Appeal.

15. Per contra, Mr. N.Manoharan, learned counsel for the plaintiffs/ respondents would submit that the suit is filed for partition since Govindasamy had died intestate and further the Will has not been proved in the manner known to law. The Trial Court had brushed aside this vital legal position. However, the Lower Appellate Court had taken note of the same and proceeded to allow the appeal



and reversed the Judgement and Decree of the Trial Court. He would submit that the Judgement of the Lower Appellate Court is well considered one and no exception need be taken to it and the same may be confirmed.

16. Heard the learned counsels and perused the records.

17. After hearing the arguments, the following Substantial Questions of Law arise in the above Second Appeal:

“(i)Whether the Lower Appellate Court was correct in law in holding that the Will, Ex.B.1 has not been proved?

(ii)Whether the Lower Appellate Court was correct in law in overlooking the time taken by the plaintiffs for approaching the Court, particularly when the 1st plaintiff's father had died nearly 35 years prior to the



S.A.No. 864 of 2021

filing of the suit?

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18. It is an admitted fact that the property in question originally belonged to Govindasamy and that the 1st plaintiff and the 1st defendant are the children of the said Govindasamy. Therefore, on the death of Govindasamy, it is the 1st plaintiff and the 1st defendant who would inherit his property. The plaintiffs have come to the Court stating that the said Govindasamy had died intestate and therefore the plaintiffs are entitled to half share in the suit schedule property. The defendants have set up a plea that the said Govindasamy had executed a Will on 09.08.1967, whereunder he had bequeathed life estate on his wife and daughters and thereafter on the male heirs and therefore the onus is upon them to prove the Will.

19. The defendants have not filed the original Will. In the course of his oral evidence D.W.1 would submit that the Will has been lost. However, there is no pleadings to this effect in the written



statement. On the contrary, the written statement proceeds on the footing that the defendants have a Will in their favour. The Lower Appellate Court has rightly observed that the defendants cannot seek to mark the certified copies. The Lower Appellate Court was right in holding that the defendants cannot rely upon the secondary evidence especially when the conditions mandated under Section 65 (c) of the Evidence Act, which stipulates that a secondary evidence can be admitted, where the original has been destroyed or lost or where the party offering the evidence of its contents is unable to produce the original within a reasonable time and such inability is not on account of his default or neglect. In order to submit secondary evidence, the defendants have to first plead that the original is not in their possession more particularly when the plaintiffs have denied the document and contended that it is a fabricated one.

20. In order to produce secondary evidence, the party has to first convince the Court about the loss of the original. However, such a



S.A.No. 864 of 2021

procedure has not been followed by the defendants. Further, the defendants who have projected the Will has not taken any steps to examine the attesting witness. To the said question, D.W.1 would state that the attesting witnesses are dead. However, the appellants have not followed the procedure under Section 69 of the Evidence Act. Therefore, the Lower Appellate Court was correct in law in rejecting the Will. Therefore, the Substantial Question of Law No.1 is answered against the defendants / appellants.

21. The defendants have not canvassed the point that the plaintiffs have approached the Court belatedly. The case of the plaintiffs is that the properties were being jointly enjoyed and the 1st defendant had been sharing the income with the 1st plaintiff and it was only when sharing had stopped that the 1st plaintiff has initiated the present suit. Therefore, the Substantial Question of Law No.2 is answered in favour of the plaintiffs.



S.A.No. 864 of 2021

22. Since the defendants have failed to prove the Will, Ex.B.1, the properties of Govindasamy has to be devolved by succession.

Therefore, the plaintiffs are entitled to the half share in the suit schedule property.

23. In the result, the Second Appeal stands dismissed. Consequently, the connected Civil Miscellaneous Petition is closed.

No costs.

27.03.2024

Index : Yes/No
Internet : Yes/No
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S.A.No. 864 of 2021

To

1.The Additional District Court / Fast Track Court,
Villupuram

2.The I Additional Sub Court,
Villupuram.

P.T. ASHA, J,

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S.A.No. 864 of 2021

S.A.No.864 of 2021

27.03.2024