



S.A.No.807 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 06.06.2024

Judgment Pronounced on : 07.06.2024

CORAM : JUSTICE N.SESHASAYEE

S.A.No.807 of 2022

Sriram

.... Plaintiff / Appellant / Appellant

Vs

1.Ramalingam

2.Purushothaman

.... Defendants / Respondents / Respondents

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code praying to set aside the judgment and decree in A.S.No.48 of 2019 dated 14.12.2021 on the file of the learned Additional District Judge (Fast Tract Court), Villupuram, confirming the judgment and decree in O.S.No.163 of 2009 dated 30.09.2016 on the file of I Additional Subordinate Judge, Villupuram, and thereby allow the second appeal.

For Appellant : Mr.N.Suresh

For Respondents : Mr.D.Babu Varadharajan for R1
R2 - No appearance



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JUDGMENT

The plaintiff who has successively lost his suit for setting aside Ex.B6, sale deed dated 29.10.2003, and for declaration of his title plus recovery of possession of the suit property after the life time of the 2nd defendant is the appellant herein. The parties would be referred to by their rank before the trial court.

2.The facts that provide the backdrop to this second appeal may now be bullet pointed:

- There are two schedules of property in relation to which this suit is directed. They are detailed in Schedules B and C to the plaint. B-Schedule deals with four items of properties, and they are dry agricultural lands with a combined total extent of 3.81 acres. The property described in the C-Schedule is a residential property.
- Of the four items of the suit properties in the B-schedule, a certain Duraisamy Pillai had purchased items 1 and 2 under Ex.B7 and Ex.B8 sale deeds. While so, some of the nephews of Duraisamy Pillai



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claimed some right over these properties, but later vide Ex.B9, dated 26.10.1931, they relinquished all their right, pursuant to which Duraisamy Pillai became the absolute title holder of the entire suit properties.

- After the demise of Duraisamy Pillai (the date of his death is not pleaded by either side), it devolved on his son one Venkatrama Pillai. According to the plaintiff, the properties are separate or personal properties of Venkatrama Pillai.
- The said Venkatrama Pillai had two sons, one of whom is the 2nd defendant. His other son had passed away issueless. Thus, the 2nd defendant became the heir apparent to the estate of Venkatrama Pillai.
- While so, on 24.04.1991, vide Ex.A1, the said Venkatrama Pillai had executed a registered Will in favour of his sole surviving son, the 2nd defendant in the suit, bequeathing only the life estate over the suit properties and the remainder estate to the plaintiff.
- Subsequently, on 28.01.1996, Venkatrama Pillai died, whereupon Ex.A1, Will came into force.
- While so, the 2nd defendant, with only a life-estate under Ext.A1 will, mortgaged items 1 and 3 of 'B' Schedule under Ex.B4, mortgage deed



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dated 12.01.2004 to secure a sum of Rs.1.50 Lakhs. Subsequently, on 06.01.2003, vide Ex.B5, he mortgaged items 2 and 4 of 'B' Schedule to the 1st defendant for securing another loan. In effect, under Ex.B4 and Ex.B5, the 2nd defendant had mortgaged all the four items of properties in the B- Schedule for securing a repayment of a total debt of Rs.3.40 Lakhs. The 2nd defendant, inasmuch as he had obtained only the life estate in the suit property, he had no right to execute any of these documents.

- Be that as it may, on 29.10.2003, vide Ex.B6, sale deed, the 2nd defendant had sold all the four items of properties in 'B' Schedule to the 1st defendant, the mortgagor of these properties, for a total sale consideration of Rs.3.50 Lakhs, though the 2nd defendant has no authority to alienate the property in favour of the 1st defendant.
- On coming to know about this development, the plaintiff issued Ex.A2, suit notice dated 03.12.2006, to the 1st defendant, but it evoked no response from the letter.

Hence, the plaintiff has laid the present suit for cancellation of Ex.B6, sale deed and also for recovery of possession.



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3. The suit was contested only by the 1st defendant, who in his written statement would plead :

(a) Items 1 to 4 properties in 'B' Schedule are not the separate or personal properties of Venkatrama Pillai. Indeed, Venkatraman and his son, the 2nd defendant, constitute a Hindu joint family and the properties themselves are ancestral properties in the hands of the 2nd defendant.

(b) Ex.B4 and Ex.B5, mortgage deeds were for family necessity and the nature of the necessity was also spelt out in the recitals of these documents. The documents recite that the amounts were borrowed either for the education of the plaintiff or for improving their agricultural land. This apart, the 2nd defendant was heavily indebted as he had to meet enormous medical expenses which involved amputation of his left leg. Indeed, Ex.B6, sale deed was executed by the 2nd defendant essentially to discharge the debts payable under Ex.B4 and Ex.B5, mortgage deeds. One of the attestors to all these documents is the wife of the 2nd defendant, who now represents her minor son, the plaintiff in the suit. The mother of the plaintiff is



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therefore estopped from challenging the validity of any of Ex.B4 to Ex.B6 documents.

(c) Inasmuch as the suit properties are ancestral in character, Venkatrama Pillai had no exclusive power to execute Ex.A1, Will.

4.1 The suit went to trial during which the mother of the plaintiff who was his next friend at the relevant time, examined herself as P.W.1. She also examined P.W.2, the scribe of the Will. By now, both the attesting witnesses to Ex.A1, Will had passed away. Therefore, she examined P.W.3, who was a senior citizen, aged around 77, living in the same village for identifying the signatures of both the attesting witnesses to Ext.A1 Will. The plaintiff had produced Ext.A1 to Ext.A4.

4.2 For the defendant, he examined himself as D.W.1 and a certain Rangarajan, an independent witness, as D.W.2. He had produced Ex.B1 to Ex.B22, of which the critical documents have already been introduced.

5.1 Of the various contention raised by the defendant, the trial Court rejected



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them in effect and held the suit properties are personal properties of Venkatrama Pillai, but it proceeded to dismiss the suit as it felt that the evidence made available by the plaintiff for proving Ex.A1 Will in the absence of the attesting witnesses is inadequate to establish its genuineness.

5.2 Aggrieved by the decree of the trial court, the plaintiff approached the first appellate Court in A.S.No.48 of 2019, and the first appellate Court literally confirmed the findings of each of the aspects involved in the suit, despite its finding that both the attesting witnesses to Ext.A1 Will had passed away. Aggrieved by the said decree, the plaintiff has come forward with this appeal.

6.This second appeal is admitted for considering the following substantial questions of law:

a) "Whether the Courts below are right in dismissing the suit when admittedly P.W.2 and P.W.3 have deposed that they were acquainted with the signatures of the attestors and testator Venkatraman?"

b) "Whether the Courts below are right in dismissing the suit when admittedly the Will Ex.A1 has been proved under Section



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69 of the Indian Evidence Act ?

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c) "Whether the Courts below are perverse and liable to be interfered with as the Courts below have totally ignored that the plaintiff had proved the requirement of statutory mandate that the attestation of one attesting witness atleast in his hand writing and that the signature of the person executing the document is in the hand writing of that person by examination of P.W.2 and P.W.3 ?"

7. The solitary point to be considered is whether the testimony of P.W.3 coupled with P.W.1 can be relied on by this Court. P.W.1 has propounded Ex.A1, Will. If the entire cross examination of P.W.1 is scanned, it shows that the 1st defendant had not challenged the execution of the Will *per se* but only focused his efforts on establishing that the testator had no authority to execute the Will. Turning to P.W.3, he is a senior citizen, aged around 77 years. He claims that he knew both the attesting witnesses to the Will and that both of them had died. He also claims that he is familiar with the signatures of the deceased attesting witnesses.

8.1 It is in this setting, the learned counsel for the appellant made the



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following submissions:

- a) The entire focus of the defendant is that the suit properties are the ancestral properties in the hands of plaintiff's paternal grandfather Venkatrama Pillai. However, on this aspect, the trial Court has held that the properties are separate properties or personal properties of the said Venkatrama Pillai. Before the first appellate Court, the 1st defendant did not file any cross objection challenging the finding of the trial Court as to the character of the suit properties.
- b) Turning to the proof of Will *per se*, the Will is a registered Will. The defendant chose only to question the authority of the testator to execute the Will and did not cross examine the factum of execution of the Will *per se*.
- c) Turning to the evidence of P.W.3, it is not the case of the 1st defendant that any of the attesting witnesses were alive or not, since his line of cross examination was aimed to ascertain if any of the direct lineal descendants of the attesting witnesses are available in the Village to prove the signatures of the attesting witnesses under Section 69 of the Indian Evidence Act, 1872. Only a suggestion was made to P.W.3 that he is not familiar with the



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signatures of any of the attesting witnesses. In other words, the 1st defendant has not made any significant dint in the quality of evidence which P.W.3 has adduced to disbelieve his testimony.

Summing up his arguments, the learned counsel submitted that the Courts below appear to have been deflected by certain answers given by P.W.3, where he concedes that he did not have any personal knowledge about the execution of Ex.A1, Will. Indeed, it is not even the case of the plaintiff that P.W.3 was present at the time of execution of the Will. It is because, the two attesting witnesses to the Will had passed away, the plaintiff was constrained to examine P.W.3 to prove the signature of the deceased attesting witnesses. Indeed, the testimony of P.W.3 is amply corroborated by P.W.2, the scribe of the Will.

9.1 Per contra, the learned counsel for the respondents took this Court through the pleadings and evidence in this case, and submitted that P.W.1 in all her cross-examination has literally conceded that she knew nothing about Ext.A1. Turning to P.W.3, he is a stranger and even he concedes in his cross-examination that he did not know anything about the Will. In fitness



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of things, the plaintiff ought to have examined those who are competent to speak about the due execution of the Will, and this was not done.

9.2 Turning to the testimony of PW3, in particular, in his chief examination, he states that PW1 had approached him with a photostat copy of a Will and enquired him if he could identify the signatures of the attesting witnesses in the Will and he too had recognised the same. However, when the witness was examined before the court, he was not confronted with Ext.A1 and his attention was not pointedly drawn to the signatures of the attesting witnesses therein for him to identify. What the PW3 had seen was mainly an alleged photocopy of Ext.A1 will, but this document was also not produced before the court to ascertain what the witness had seen indeed was a true and exact copy of Ext.A1. For Sec.69 of the Indian Evidence Act to apply, it is imperative that the original Will is confronted to the witness. So far as the present case is concerned, notwithstanding the examination of PW3, there is no formal proof of Ext.A1 even for the purposes of Sec.69 of the Indian Evidence Act.

9.3 This apart, the suit is premature since during the lifetime of the second



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defendant, the plaintiff cannot seek cancellation of the sale deed since even going by plaintiff's version, the second defendant can deal with the property which will be co-terminus with the lifetime of the second defendant.

10. The rival submissions are carefully evaluated and this court finds that there is ample merit in the contentions of both. The submissions of the counsel for the plaintiff/appellant that P.W.3 was examined only to identify the signatures of the attesting witnesses to Ext.A1 in terms of Sec.69 of the Evidence Act, and hence his lack of knowledge about the execution of the Will is appreciable. However, the point is whether P.W.3 indeed has identified the signatures of the attesting witnesses to Ext.A1. Here the first defendant/first respondent scores all the critical points.

11. For proving the signatures for the purpose of Sec.69, the witness who is competent to speak about the same must identify the same in the very document which the court has admitted in evidence. Very evidently this had not been done. As rightly argued by the counsel for the first defendant, P.W.3, in his affidavit of chief examination has only averred that he was shown a photocopy of the Will and that he had identified those signatures in that



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document in his house, and there his effort at identifying the signatures of the attesting witnesses stops. In fitness of things, the counsel for the plaintiff should have required P.W.3 to identify the signatures of the attesting witnesses in Ext.A1 before the court and with reference to the said document. This has not been done. This therefore, implies that even though the plaintiff has examined P.W.3 to prove the signatures of the attesting witnesses to Ext.A1, yet it fell short of the requirement in law. Alternatively, the plaintiff has not even produced the very photocopy of the Will which P.W.3 claims to have seen. How to be certain that the photocopy of the Will said to have been seen by P.W.3 is the exact copy of Ext.A1?

12. Sheer oversight on the part of the counsel of the plaintiff before the trial court has cost the plaintiff now. This would not have happened if the witness was examined in chief before the Court, instead of letting such critical witness to file his/her affidavit of chief examination. Since chief examination through the affidavit of the witness has become the accepted norm in terms of Order XVIII Rule 4 CPC, there is always a lurking possibility that such serious mistakes could casually happen.



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13. In conclusion, this court has to hold that Ext.A-1 has not been proved in the manner which law mandates. Consequently this appeal is dismissed. No costs.

07.06.2024

asr/ds

To:

1. The Additional District Judge (Fast Tract Court),
Villupuram,
- 2.The I Additional Subordinate Judge
Villupuram,



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N.SESHASAYEE.J.,

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Pre-delivery Judgment in
S.A.No.807 of 2021

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