



S.A. No.588 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.02.2024

DELIVERED ON : 04.03.2024

CORAM:

THE HON'BLE MR. JUSTICE P.B. BALAJI

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M.Sivagurunathan

.... Appellant

Versus

1.Valliammal
2.T.Velumani
3.M.G.Palaniswamy
4.R.Dinesh
5.G.Murugesan
6.Sakthivel
7.P.K.Duraiswamy

... Respondents

Second Appeal filed under Section 100 of the Civil Procedure code, against the decree and judgment passed in A.S. No.1 of 2016 dated 31.08.2016 on the file of III Additional District and Sessions Judge, Gobichettipalayam, confirming the judgment and decree dated 27.10.2015 made in O.S.No.78 of 2013 on the file of the Subordinate Judge, Sathyamangalam.



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For Appellant

: Mr.R.T.Shyamala
for Mr.S.P.Harikrishnan

For Respondents

: Mr.M.S.Krishnan
Senior Counsel for
Mr.R.Bharath Kumar
For R.1 and R.2
R.3 to R.7 – Not ready in notice

JUDGMENT

The plaintiff, in a suit for declaration and injunction, is the appellant herein. The plaintiff filed a suit in O.S.No.78 of 2013, basing his claim on a Will dated 27.11.1997, said to have been executed by Kumarasamy Mudaliar, his father's paternal uncle. Admittedly, the said Kumarasamy Mudaliar died on 07.02.1998. The brief facts set out in the plaint in support of the relief of declaration and injunction are as follows:

2. The property originally belonged to one Marappa Mudaliar. He was blessed with two sons and a daughter, by names Ganapathysamy Mudaliar, Kumarasamy Mudaliar and Muthammal. Ganapathysamy had one son by name Murugesan, who is the father of the appellant herein. The said Murugesan was blessed with two sons by name, G.M.Babu and



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M.Sivagurunathan (the appellant herein). Muthammal was blessed with a son by name Thangavelu and he was blessed with a daughter Velumani, who has been cited as 2nd defendant.

3. The testator Kumarasamy Mudaliar had no issues. His wife Valliammal is the first defendant in the suit and the father of the appellant G.Murugesan has been arrayed as fifth defendant in the suit and claiming that Kumarasamy Mudaliar had executed a Will in his favour and that the properties are being sold by the defendants, the suit came to be instituted.

4. The defendants filed written statement stating that the Will was not true and genuine and that it was executed under suspicious circumstances. Therefore, the plaintiff could not claim any relief of declaration based on the alleged Will, executed by Kumarasamy Mudaliar.

5. The trial Court dismissed the suit, holding that the plaintiff had not established right or title to the suit property. The first appellate Court also concurred with the findings rendered by the trial Court and dismissed the



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appeal filed by the appellant. Aggrieved by the concurrent findings of the Courts below, the present Second Appeal has been filed.

6. On 09.11.2023, the Second Appeal has been admitted on the following two substantial questions of law:-

1. Are the Courts below correct and justified in holding that the Will is not true especially when the plaintiff as propounder, has proved the Will by examining the attestors as PW2 and PW3 and having complied with statutory requirements regarding proof of Will?

2. Whether the findings of the Courts below that the appellant herein purchased a portion of the property covered under Ex.B1 Will is vitiated by misreading of documentary evidence available on record?

7. I have heard Ms.R.T.Shyamala, learned counsel for the appellant and Mr.M.S.Krishnan, learned Senior Counsel representing for Mr.R.Bharath Kumar, counsel for the respondent 1 and 2.



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8. Learned counsel for the appellant has filed a Genealogy Tree, showing the relationship between the parties. Learned Senior Counsel appearing for the respondents 1 and 2 submits that the said Genealogy Tree can be taken as admitted.

9. The case of the learned Senior Counsel for the respondents 1 and 2 is that the Courts below non suited the plaintiff mainly on the ground that the Will was not brought to the light immediately after the demise of the testator, Kumarasamy Mudaliar and surfaced after 14 years after the demise of Kumarasamy Mudaliar. The Courts have held that in furtherance of the said Will, the appellant has not taken any steps whatsoever to have the records mutated in his name. Further, the sale deed, Ex.B.1 dated 23.05.2005 has also been heavily relied upon by the trial Court as well as the first appellate Court to disbelieve the Will, Ex.A.2. The sale Deed, Ex.B.1 is the purchase made by the appellant from Valliammal/1st defendant, who is the wife of Kumarasamy Mudaliar and even at that point of time, neither Valliammal/1st defendant/wife of the testator nor the appellant had referred or whispered anything about the alleged Will in Ex.A.2. Further, the Courts also found



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that scribe of the said Will had not been examined and for all these reasons, the Will was disbelieved, even though both the attestors to the said Will have been examined in support of due execution and attestation of Ex.A.2 Will.

10. The first appellate Court concurred with the findings of the trial Court and according to the learned counsel for the appellant, the Courts below have committed an error apparent on the face of the record since the property covered under Ex.B.1 sale deed was totally different and not forming part of the subject matter of the Will. She would take me through the schedules in the partition deed, Ex.A.1 dated 19.01.1961, Ex.A.2 Will dated 27.11.1997, Ex.B.1, Sale Deed dated 23.05.2005 as well as the plaint in O.S.No.121 of 2014 which was a suit filed by Valliammal against the brother of the appellant, G.M.Babu and she would make an attempt to establish that the property which was purchased by the appellant under Ex.B.1 Sale deed dated 23.05.2005 was entirely different and not the subject matter of Ex.A.2 Will dated 27.11.1997. According to the learned counsel for the appellant, the Courts below have lost sight of these facts and proceeded to disbelieve the Will for the reasons aforementioned which are not amounting to suspicious



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circumstances. She would also state that examination of scribe was not mandatory and the Will had been clearly proved by the evidence of P.W.2 and P.W.3, the attesting witnesses.

11. The learned counsel for the appellant has also filed written submissions and I could gather from the said written submissions that the appellant is taking a stand that merely because the plaintiff had admitted in his evidence that he purchased the property under Ex.B.1 sale deed and that the same was only forming part of Ex.A.2 Will, according to the learned counsel for the appellant, the said admission could not over write the character of the document. In this regard, she would place reliance on Section 91 of the Indian Evidence Act, 1872 and state that on a comparison of the plaint schedule and items 14 to 16 of Ex.A.1 Partition Deed dated 19.01.1961, it would clearly establish that item 16 of the partition deed was never subject matter of the Will or the plaint in O.S.No.78 of 2013. Therefore, applying Section 91 of the Indian Evidence Act, 1872, learned counsel for the appellant would state that Valliammal had absolute right, being the legal heir of the Kumarasamy Mudaliar and therefore, the sale deed



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for 1600 sq.ft in favour of the appellant dated 23.05.2005 in Ex.B.1 was valid. She would also contend that there is no bar for the appellant to purchase the property which does not form part of the Will property and therefore, even if the plaintiff had erroneously admitted that he purchased only a portion of the Will property, referring to the schedules in the various documents, she would contend that oral evidence cannot overwrite the documentary evidence. Further, she would also state that the Will has been proved to be duly executed and attested and it was not necessary for the Scribe to be examined.

12. Learned counsel for the appellant also placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Meena Pradhan and Others vs Kamla Pradhan and Another*** reported in ***(2023) 9 SCC 734***, where the Hon'ble Supreme Court has elaborately discussed the requirements for proof of a Will and also held that suspicious circumstances must be real, germane and valid and not merely the fantasy of the doubting mind. She would therefore pray for the Second Appeal being allowed, setting aside the concurrent findings of the Courts below.



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13. Per contra, Mr.M.S.Krishnan, learned Senior Counsel, appearing for the respondents 1 and 2 would state that the property, which was purchased by the appellant, was forming a smaller portion of the very same property, which is the subject matter of the Will and that the fact that the Will schedule is verbatim the same as in the partition deed in Ex.A.1, ignoring the subsequent change in survey numbers and boundaries, as evidenced in Ex.B.3 sale deed dated 11.04.1997, which was just seven months prior to the execution of the alleged Will. Moreover, the learned Senior Counsel would submit that the testator died on 07.02.1998 and it is the case of the plaintiff that the Will was handed over to the brother of the appellant viz., G.M.Babu, who in turn, handed over the same to the father of G.Murugesan/5th defendant herein. While so, it is really surprising as to why the Will was kept under wraps for several years and came to the lime light only prior to the filing of the suit in the year 2013. Further, the learned Senior Counsel would also invite my attention to the admissions of P.W.1 in cross examination.

14. I have carefully considered the rival submissions put forth by the



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learned counsel for the appellant and the learned Senior Counsel appearing for the respondents 1 and 2.

15. I have gone through the evidence adduced by the parties, oral and documentary. P.W.1 has been cross examined at length and P.W.1 has categorically admitted that the property that he purchased under Ex.B.1 Sale Deed was only forming part of Ex.A.2 Will. In fact, several suggestions have been put to P.W.1 as to why he spent Rs.75,000/- on sale consideration when the property had already bequeathed to him under Ex.A.2 Will. He has not denied any of the suggestions and on the contrary, has categorically admitted that the property purchased by him, under Ex.B.1 Sale Deed, was only forming part of the subject matter of the Will. Therefore, the learned Senior Counsel would state that the delay in bringing the Will to the fore front would definitely be fatal in the facts of the present case, especially, when there were also two other suits, which were tried together along with the present suit proceedings. Learned Senior Counsel would also place judgment copies in S.A.Nos.589 and 590 of 2017 which were at the instance of the brother of the appellant herein and both the Second Appeals were filed

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against the wife of the testator/Kumarasamy Mudaliar and both the Second Appeals came to be dismissed by this Court.

16. That apart, learned Senior Counsel would also produce a sketch, for ease of understanding the lay of the property and in order to show that what was purchased by the appellant under Ex.B.1 Sale Deed was only forming part of the property covered under Ex.A.2 Will. Learned Senior Counsel would also take me through the boundaries of the suit property and correlate the same with the boundaries in Ex.A.1 partition deed and Ex.B.1 Sale Deed. He would therefore pray for dismissal of the Second Appeal as the plaintiff himself had given up his case in cross examination, by admitting that the property which he purchased was only part of the subject matter of the property, covered under the Will. Even though the learned counsel for the appellant has contended that even if the plaintiff had conceded or admitted that he purchased only a portion of Item 2 of the Will property and the documents exhibited before the Court or otherwise and Section 91 of the Indian Evidence Act, 1872 would come into play, I have gone through the plaint schedule, the schedules in the Will as well as the partition deed and the



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sale deed. As rightly pointed by the learned Senior Counsel, it is clear that the appellant purchased only a portion of the property covered under Ex.A.2 Will. I have also compared the boundaries in the above documents with the sketch produced by the learned Senior Counsel for the respondents showing the 4 boundaries in Ex.A.1 partition deed as well as Ex.A.2 Will. It is clear from these schedules as well as the sketch, that the property, which has been purchased by the appellant, is only forming part of item 2 of the Will property and not as stated by the learned counsel for the appellant. The reason for confusion even arising in the first place with regard to the boundaries is because the schedule in the Will is as per 1961 partition deed and subsequently the description of the property has underwent a sea change and new door number and re-survey numbers have been assigned which is evidenced from Ex.B.3 sale deed. In fact, Ex.B.3 sale deed was just 7 months prior to the alleged Will and if really the Will had reflected the current lay of the property, then the description would have been on the lines of the properties described in Ex.B.3 sale deed and not in line with item 2 of the 1961 partition deed in Ex.A.1. Therefore, I am unable to countenance the submissions of the learned counsel for the appellant with regard to the



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description of the properties.

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17. The next issue pertains to Ex.A.2 Will and its truth and genuineness. Though the plaintiff came to Court with a specific case that the suit property was allotted to the plaintiff under Ex.A.2 Will and the defendants were trying to alienate portions of the suit property and also attempting to disturb the possession of the plaintiff and only in such circumstances alone the suit came to be filed. The declaratory prayer is only based on the alleged Will dated 27.11.1997. The said Will is admittedly an unregistered Will. Even though, I find that the attesting witnesses have been examined and it appears that execution of the Will has been proved as required under Section 63 (c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, the said Will cannot be a sole criteria for deciding the title of the appellant. The proof of Will is one aspect and the plaintiff claiming title is entirely another aspect. If really the Will was executed by the testator in the year 1997 and handed over to the own brother of the plaintiff, who, in turn, handed over the same to the plaintiff's father, there is no necessity for the plaintiff to have proceeded to pay a sum of



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Rs.75,000/- and purchase a small portion out of the Will property, when he had already become the owner of the entire subject matter of the Will property on the demise of Kumarasamy Mudaliar.

18. Therefore, in the peculiar facts of the present case, mere proof of the due execution and attestation of the alleged Will would not suffice and the plaintiff had to establish that the property which he purchased under Ex.B.1 Sale Deed was not forming part of Ex.A.2 Will. However, this is not the ground raised before this Court either in the Memorandum of Grounds of Appeal or by way of substantial questions of law. On the contrary, as rightly held by the learned Senior Counsel, the admissions of P.W.1 clearly goes to show that the property which he has purchased under Ex.B.1 Sale Deed , is not a different property, but only forming part of the property, which is the subject matter of the Will. The Will also does not describe the suit property effectively and it has followed the schedule which was available in Ex.A.1 Partition deed dated 19.01.1961, under which, the testator Kumarasamy Mudaliar got the said property along with other properties. More over, the father of the plaintiff was also arrayed as 5th defendant in the suit and atleast



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the plaintiff could have ensured that his father was examined to explain the delay as to why the Will had not been disclosed earlier or as to how the property covered under the Will was not affecting the property purchased by the plaintiff under Ex.B.1.

19. Thus, even though the plaintiff has been able to satisfy the requirements of Section 63(c) the Indian Succession Act, 1925, the delay is certainly a suspicious circumstance in the present case. The burden is only on the plaintiff, who claims the benefit under the Will to dispel the suspicious circumstance and claim the right under the Will. Hence, admittedly, the plaintiff has not chosen to disclose the Will at the earliest point of time and the Will also has admittedly not been acted upon, especially, in the light of the purchase made by the plaintiff himself under Ex.B.1 Sale Deed which is actually a portion of the property which is bequeathed to him under Ex.A.2 Will.

20. Though the Will has been proved to be duly executed, suspicion surrounding in execution has not been dispelled with and the delay in the



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Will surfacing, in the light of the plaintiff himself purchasing a portion of the Will property, clearly goes to show that all was not well with the alleged Will. Further, I find that there is no misreading of documentary evidence available on record as suggested by the learned counsel for the appellant by way of the second substantial questions of law. As already discussed herein above, the appellant himself has categorically and in no uncertain terms admitted that the property purchased under Ex.B.1 Sale Deed was forming part of Ex.A.2 Will property.

21. In view of the above I do not find any substantial questions of law to be arising in the first place. Even otherwise, the substantial questions of law that have been framed by this Court are only to be answered in the negative, against the appellant.

22. In fine, the judgment and decree passed in A.S. No.1 of 2016 dated 31.08.2016 on the file of III Additional District and Sessions Judge, Gobichettipalayam, confirming the judgment and decree dated 27.10.2015 made in O.S.No.78 of 2013 on the file of the Subordinate Judge,



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Sathyamangalam does not require interference and the Second Appeal stands dismissed. No costs.

04.03.2024

Index: Yes/No
Speaking Order/Non-Speaking Order
sr

To

1. The III Additional District and Sessions Judge, Gobichettipalayam.
2. The Subordinate Court, Sathyamangalam
3. The V.R.Section, High Court, Chennai.



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P.B.BALAJI,J.

sr

Pre-Delivery Judgment
in S.A.No.588 of 2017

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