



S.A.No.737 of 2018

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Judgment Reserved on 15.03.2024	Judgment Pronounced on 22.03.2024
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THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.737 of 2018
and C.M.P.No.21474 of 2018

Ponnusamy

..Appellant

Vs.

1.Karuppusamy
2.Palanisamy

..Respondents

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 11.08.2017 made in A.S.No.39 of 2016 on the file of the Subordinate Judge, Sathyamangalam, confirming the judgment and decree dated 27.04.2016 passed in O.S.No.215 of 2008 on the file of the District Munsif, Sathyamangalam.

For Appellant : Mr.P.Dinesh Kumar

For Respondents

For R1 : No appearance

For R2 : Mr.R.Babu



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JUDGMENT

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This Second Appeal has been filed against the judgment and decree dated 11.08.2017 made in A.S.No.39 of 2016 on the file of the Subordinate Judge, Sathyamangalam, confirming the judgment and decree dated 27.04.2016 passed in O.S.No.215 of 2008 on the file of the District Munsif, Sathyamangalam.

2.The plaintiff, who suffered concurrently in a suit for declaration and injunction, is the appellant herein.

3.The parties are described as per their litigating status before the Trial Court.

4.The brief facts of the case are as follows:

The plaintiff filed a suit against his brothers. According to the plaintiff, the property was originally purchased by the paternal grandfather of the plaintiff, Chinna Pacha Gounder under two Sale Deeds dated 06.04.1958 and 02.02.1974. The plaintiff is the son of the 1st defendant and the 2nd defendant is the paternal uncle of the plaintiff. According to the plaintiff, the



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grandfather was very affectionate towards him and he had left a Will, which was in the custody of the aunt Valliammal. The 1st defendant, father of the plaintiff acted as guardian of the plaintiff and accordingly, he was cultivating the suit property on behalf of the plaintiff. The plaintiff was residing in a hostel and studying at Kavalipalayam Higher Secondary School and since he developed bad friendship, he did not do well in 10th standard examinations and he had failed. Fearing his father's anger, he ran away and joined a bore well Company and returned to the family only in the year 2007. At that point of time, his aunt informed him about the Will of the grandfather, Chinna Pacha Gounder, who had in the meantime died on 23.01.1997. According to the plaintiff, his father joined hands with his brother i.e., uncle of the plaintiff and caused disturbances to the plaintiff and he also disputed the title of the plaintiff in the suit property. Hence, the plaintiff was constrained to file the suit for declaration and injunction.

5.The said suit was resisted by the father of the 1st defendant, claiming that there was a registered Will executed by the grandfather on 27.05.1994, bequeathing the suit property to the 2nd defendant's daughter and the Will executed by the grandfather on 04.01.1997 in Ex.A8 was not true and genuine and the plaintiff could not claim any right, title or interest in the suit



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property based on the said Will. It is also contended by the 1st defendant that the suit was bad for non joinder of necessary party, namely, the daughter of the 2nd defendant.

6.Before the Trial Court, the 2nd defendant remained exparte and the 1st defendant contested the suit. The Trial Court dismissed the suit and aggrieved by the same, the plaintiff preferred an appeal, which was also dismissed. As against the concurrent findings, the plaintiff has come up by way of the Second Appeal.

7.I find that the Second Appeal has not yet been admitted. However, I have heard Mr.P.Dineshkumar, learned counsel for the appellant as well as Mr.R.Babu, learned counsel for the 2nd respondent for final hearing of the Second Appeal.

8.(a) Mr.P.Dineshkumar, learned counsel for the appellant would challenge the concurrent findings of the Courts below, contending that the Will had been duly proved and the alleged suspicious circumstances, which had been discussed and accepted by the Courts below to invalidate the Will were not actually germane circumstances to suspect the truth and genuineness



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of the Will. The learned counsel for the appellant would invite my attention to the findings of the Courts below with regard to the various circumstances, treated as suspicious circumstances by the Courts below, namely; Firstly, there was no mention about the earlier registered Will in the subsequent Will. Secondly, though the earlier Will was registered the subsequent Will was not registered and no reasons were assigned for execution of a fresh Will. Thirdly, inconsistencies and contradictions in the evidence of the attesting witnesses with regard to the use of same pen and also lastly, the place of execution of the Will being totally a different village, where the testator was not normally residing.

(b) The learned counsel for the appellant would state that the Courts would have to sit in the armchair of the testator and unfortunately, both the Courts have not put themselves in the shoes of the testator to decide whether the bequests were probable and reasonable. He would further state that by examining the attesting witnesses, the plaintiff had proved the execution of the Will and the alleged circumstances set out to be suspicious circumstances were actually not suspicious circumstances surrounding the execution of the Will and therefore, the burden was only on the defendants to disprove the Will, which according to the learned counsel for the appellant has not been



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done to the satisfaction of the Court.

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(c) The learned counsel for the appellant would place reliance on the following decisions:

1. ***2004 3 CTC 561 (Senthilkumar rep. by Guradian, Chockalinga Mudaliar and Another Vs. Dhandapani and Others).***
2. ***2006 2 CTC 397 (Manickam Vs. Sakunthala @ Rajeswari and Others).***
3. ***2014 2 LW 724 (Sridhandappa @ Rajappa Vs. Muniamma).***
4. ***Manu/TN/0850/1995 (S.Susila Vs. Virudhunagar Hindu Nadarkalukku Pathiyapatta V.V.Vanniaperumal Women's College Managing Board).***

9.Per contra, Mr.R.Babu, learned counsel for the 2nd respondent would submit that, first and foremost, the suit was liable to be dismissed on the ground of non joinder of proper and necessary party, namely, the daughter of the 2nd defendant. According to the learned counsel for the respondent even at the earlier instance, in the written statement, it has been brought to the notice of the plaintiff that there is an another registered Will, in and by which, the property has been bequeathed to the 2nd defendant's daughter. Despite the



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same, the plaintiff has not taken any steps to implead the said daughter of the 2nd defendant as a party to the suit and in her absence, the validity of the 2nd Will cannot be decided. Secondly, he would also support the findings of the Courts below that the Will was also not valid and binding since the propounder, namely the plaintiff, failed to dispel the various suspicious circumstances, which have been extensively discussed by the Courts below.

10.I have paid my anxious and careful consideration to the rival submissions advanced by the learned counsel on either side.

11.I would take up the issue of non joinder of the beneficiary under the earlier Will in Ex.B1 dated 27.05.1994. If this issue is decided against the appellant, then there will be no necessity to go into the other issues regarding the validity of the Will. Admittedly, the specific case of the 1st defendant is that the grandfather, the testator, Chinna Pacha Gounder had executed a registered Will on 27.05.1994, which was also marked as Ex.B1, and under the said Will, the property has been bequeathed to the daughter, who is none else than the daughter of the paternal uncle of the plaintiff. Despite the specific contention taken at the earlier instance by way of the written statement, the plaintiff has not chosen to implead the daughter of the 2nd



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defendant as a party to the suit.

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12.Considering that the plaintiff desires to declare his title to the suit property, in all fairness, he should have taken immediate steps to implead the daughter of the 2nd defendant and ought to have proved the Will in her presence and without doing so, the plaintiff has taken a risk in proceeding the suit and suffered concurrent findings not only on the ground of non joinder but also on the ground that the Will had not been established to be true and genuine, especially, for various suspicious circumstances not being dispelled by him.

13.I am in entire agreement with the findings of the Courts below with regard to the plea of non joinder of the daughter of the 2nd defendant. Admittedly, the 2nd defendant remained exparte. However, the 1st defendant, who is none else than the father of the plaintiff, has brought it to the notice of the plaintiff that there is another registered Will dated 27.05.1994. The proper course of action would be to prove the Will in the presence of the beneficiary of the registered Will dated 27.05.1994 in Ex.B1. The suit being one for declaration of title, the plaintiff cannot seek such a relief in the absence of a proper and necessary party. The Courts below rightly found that the plaintiff



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was disentitled to a decree of declaration and the same does not warrant interference.

14.In view of the above, even though some of the circumstances that have been spelt out by the Courts below to be suspicious circumstances are not actually suspicious circumstances, for example, non-mentioning of earlier Will in the subsequent Will or executing an unregistered Will when there is a registered Will etc., are not suspicious circumstances and in any event, these issues need not be gone into, in view of the fact that the suit is liable to be dismissed on the ground of non joinder of proper and necessary party, namely, the beneficiary under Ex.B1, Will. I do not find any substantial question of law arising for consideration in this Second Appeal.

15.In fine, the Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is closed.

22.03.2024

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

- 1.The Subordinate Judge, Sathyamangalam.
- 2.The District Munsif, Sathyamangalam.
- 3.The Section Officer, V.R.Section, High Court, Madras.

P.B.BALAJI., J.

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Pre-delivery judgment made in
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