



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 08.02.2024	Pronounced on: 01.03.2024
-------------------------	---------------------------

CORAM

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.789 of 2019
and
CMP. No.15656 of 2019

1.Ramasamy
2.Elangovan
3.Sakthivel
4.Kala
5.Indirani

...Appellants

Vs.

Vasantha

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure to set aside the Judgment and Decree as made in A.S. No.19 of 2016 dated 30.11.2017 on the file of the 4th Additional District Court, Erode District at Bhavani, confirming the Judgment and Decree as made in O.S. No.69 of 2007 dated 01.06.2016 on the file of the Subordinate Court, Bhavani, Erode District.

For Appellants	: Mr.S.Parthasarathy, Senior Counsel for Mr.V.Balamurugane
For Respondent	: Mr.A.K.Sriram, Senior Counsel for Mr.S.A.Shanmugam



WEB COPY



S.A.No.789 of 2017

JUDGMENT

The unsuccessful defendants in a suit for partition and separate possession are the appellants in the Second Appeal.

2. The parties are described as per their litigative status before the trial Court.

3. The plaintiff, claiming to be the daughter of one Duraisamy, Son of Karuppa Gounder has filed the suit. It is her case that her grandfather Karuppa Gounder, was in enjoyment of specific portion of lands that devolved on him and he died prior to 1956 i.e., before the coming into force of the Hindu Succession Act. He had two sons viz., Duraisamy and Ramasamy and they became entitled to 50% equal share in the properties of late Karuppa Gounder. The plaintiff's father Duraisamy married one Kuppayee and the plaintiff is their only child. The mother of the plaintiff died when the plaintiff was 16 years old and it was only the plaintiff who took care of her father. The plaintiff being handicapped, her father offered to settled his entire half share to her at the time of her marriage. Despite the



same, the plaintiff's father continued to cultivate the lands and much later, when he suffered an accident, he executed his last Will and testament on 27.04.2007, bequeathing all his properties in favour of the plaintiff.

4. It is the further case of the plaintiff that even dehors the said Will, being the only surviving legal heir, the plaintiff would any way become entitled to the entire share of her father. As the defendants denied the plaintiff's right to cultivate her half share and in view of the fact that there was no partition, the plaintiff filed the suit seeking her half share to be declared and consequently, she being put in possession of the same.

5. The third defendant filed a written statement denying that the plaintiff was the daughter of Duraisamy. The alleged Will dated 24.07.2007 is also denied. According to the defendant, Duraisamy and his wife had no male issues and after the death of his wife Kuppayee, Duraisamy was only living with the first defendant. According to the defendants, on 30.11.1978, Duraisamy had executed a registered Will, in sound and disposing state of mind, bequeathing his property to defendants 2 and 3, who were then minors. According to the defendants, the plaintiff was therefore not entitled



to any relief.

6. The trial Court, finding that the plaintiff had established her right for partition, decreed the suit.

7. The defendants preferred an Appeal in A.S. No. 19 of 2016. Before the First Appellate Court, an application has been taken out under Order 41 Rule 27 to let in additional evidence, viz., the Application form lodged by the plaintiff for legal heir certificate of Duraisamy. However, the First Appellate Court has refused to admit the said additional evidence and rejected the application. Deciding the Appeal, the First Appellate Court held that the defendants have not proved the Will put forth by them and consequently, dismissed the Appeal.

8. On 25.07.2019, the above Second Appeal was admitted on the following substantial questions of law:

“ a) Whether The courts below are right in decreeing the suit for partition solely based on Ex.A3/Legal heirship certificate when such document was not proved by the plaintiff by examining the Government Official who issued the document?

b) Whether the courts below are right in decreeing the



suit for partition when the plaintiff had not proved her parentage properly?

c) Whether the findings of the court that the 'Will' dated 30.11.1978 marked as Ex.B1, were not proved is correct when the same was proved beyond doubt by adducing available records and evidence?"

9. Heard Mr.S.Parthasarathy, learned Senior Counsel for Mr.Balamurugane, learned counsel for the appellants and Mr.A.K.Sriram, learned Senior Counsel appearing for Mr.Rajasekar, learned counsel for the respondents.

10. The learned Senior Counsel for the appellant, Mr.S.Parthasarathy contends that though the plaintiff claims to be the daughter of Duraisamy, the appellants having specifically denied such claim, the burden was on the plaintiff to establish that she was the daughter of Duraisamy. Further, the learned Senior Counsel would also state that the Courts having held that the Will projected by the plaintiff having not been established or proved as required under law, the Courts below erred in presuming the plaintiff to be the daughter of Duraisamy, without any backing evidence to substantiate the



said claim.

11. The learned Senior Counsel would also state that Ex.B1, though unregistered ought to have been relied on by the Courts below invoking presumption under Section 90 of the Indian Evidence Act, 1872. He would also point out that Duraisamy died on 06.09.2007 and he is said to have executed the Will in favour of the plaintiff, few months prior to his demise and more so, the said Will has not been proved by examining any of the witnesses and the Courts below ought to have dismissed the suit for partition.

12. The learned Senior Counsel would also rely on the following Full Bench decision of this Court in the case of *P.Venkatachalam Vs. The Tahsildar* reported in 2022-4-L.W-page 1, (ii) *Munnalal, minor and others Vs. Mst.Kashibai and others* reported in AIR (34) 1947 Privy Council page 15 and (iii) *Murugayee (Dead) rep. by her LR, Meenakshi vs. Suguna Sambandam and others* reported in 2011 (5) CTC 83, in support of his arguments. He would further contend that the Will of the year 1978, can be presumed to be duly executed, not requiring examination of atleast one of the attesting witnesses to prove the Will and also for the procedure



regarding legal heirship certificate, which has been clearly spelt out in the Full Bench decision has not been followed in the case on hand by the plaintiff.

13. Per contra, Mr.A.K.Sriram, learned Senior Counsel would invite my attention to the pleadings in the written statement of the third defendant, where the defendants themselves have chosen to only state that Duraisamy, through his wife Kuppayee did not have any male issues. Therefore, according to the learned senior counsel, the pleading of the defendants is to be understood that they have not denied the existence of any female issues to Duraisamy and his wife Kuppayee. He would also invite my attention to the evidence of P.W.3, uncle of the defendants who has stated that Duraisamy and Kuppayee were blessed with only one child, that too a female child by name Vasantha, who is the plaintiff. He would also further referred to cross examination of the third defendant who has been examined as D.W.1, where he has admitted that plaintiff's maternal uncle is Kali Gounder. He has also admitted in cross examination that plaintiff is a physically challenged lady and the witnesses who have been examined on the side of the plaintiff are in fact, also related to him. He would also invite



my attention to the findings of the First Appellate Court, disbelieving the evidence of D.W.1 to D.W.4. He would also state that the First Appellate Court has rightly placed reliance on Ex.A3, legal heirship certificate holding that the discrepancy in the name of the father i.e., mentioned as Karuppanna Gounder instead of Karuppa Gounder would not be fatal. The learned Senior Counsel would also state that the process for issuing legal heir certificate was streamlined much later, that too pursuant to the decision of the Full Bench of this Court on which the learned Senior Counsel for the appellants placed reliance on, and therefore, during the relevant point of time when Ex.A3 was issued, such a procedure was not in vogue and therefore, the ratio laid down by the Full Bench cannot be applied to the facts of the present case. He would therefore, pray for the Second appeal being dismissed.

14. I have carefully considered the arguments advanced by the learned Senior Counsel on either side. It cannot be stated that the plaintiff is not the daughter of Duraisamy, for more than one reason. The defendants themselves have only gone on record in the written statement stating that Druraisamy and his wife Kuppayee were not blessed with male issues. If it



was really their case that Duraisamy and Kuppayee had no children at all, then the pleading would have been otherwise. This specific pleading has caught the eye of the Court. This is also supported and corroborated by the evidence of P.W.3 who has categorically asserted that the plaintiff was the only child of Duraisamy and Kuppayee. Even though, it is stated by the learned Senior Counsel for the appellant that the said witness P.W.3 who was examined on the side of the plaintiff, was none else than her own maternal uncle and he was an interested witness, I find from the evidence of the third defendant who was examined as D.W.1 that he has stated P.W.3 is also related to him. That apart, D.W.1 has also admitted that there is no proof to establish their claim that Duraisamy lived only with them after the demise of his wife Kuppayee. Therefore, I do not see any valid reasons or grounds to interfere with the findings of the Courts below that the plaintiff is the daughter of Duraisamy.

15. The next question that would require adjudication is with regard to Will dated 30.11.1978. Admittedly, the said Will has not been proved by examining any one of the two attesting witnesses. Only for the proposition that the Will being an ancient document that is more than 30 years old and



can be presumed to be duly executed, the learned Senior Counsel has placed reliance on the decision of the privy council in *Munnalal's case* and learned Single Judge of this Court in *Murugayee's case*, where the Courts have held that if the document is more than 30 years old and comes from proper custody of beneficiary, it would also be entitled to be presumed to be duly executed, in terms of Section 90 of the Indian Evidence Act, 1872.

16. Section 90 of the Indian Evidence Act, 1872 is extracted hereunder for easy reference:-

“ 90. Presumption as to documents thirty years old.

Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purport to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.”

17. (i) The privy council in *Munnalal's case* referred herein supra is a three Judge Bench and in the said decision it has been held that Section 90 would also apply to Wills, especially for drawing a presumption that the testator was of sound mind. The Division Bench of the Calcutta High Court



in *Sarat Chandra Mondal and others Vs. Panchanan Mondal and another* reported in *AIR 1953 Calcutta 471 (DB)* also held that Section 90 can be invoked to presume due execution and genuineness of a Will which is in controversy before a Court.

17 (ii). Even our High Court in *Celestine Sylcabai Vs. Josephin Noranhabbhai* reported in *AIR 1956 Madras 566* has taken a similar view. A Division Bench of our Court in *Nammalvar and others Vs. Appavu Udayar and others* reported in *AIR 1969 Madras 283* has held that when the Will was an ancient document and the attesting witnesses not being alive and there being no suspicious circumstances, presumption available under Section 90 can be drawn to hold that the Will has been proved.

17 (iii). However, subsequently, the Hon'ble Supreme Court in *MB Ramesh (Dead) by LRs vs. K.M.Veeraje Urs (Dead) by LRs and others* reported in *(2013) 7 SCC 490*, following the earlier decision of the Hon'ble Supreme Court in *Bharpur Singh and others Vs. Shamsher Singh* reported in *(2009) 3 SCC 687*, held a contra position that a presumption under Section 90 would not apply to Wills.

17 (iv). Though the principle laid down by the Privy Council in *Munalal's* case referred herein supra was given a seal of approval by the



Hon'ble Supreme Court in *K.V. Subbaraju Vs. C.Subbaraju* reported in *AIR 1968 SC 947*, the Hon'ble Supreme Court however in *K.V.Subbraju's* case, held that presumption was available only to due execution and attestation of the Will, provided that the original Will was before the Court. Though the Privy Council judgment has been rendered by a larger Bench comprising of three Judges and the Apex Court ruling in both *M.B Ramesh* as well as *Bharpur Singh* cases are by a Bench strength of two Judges, strictly the ratio laid down in *M.B.Ramesh* and *Bharpur Singh* cases cannot be taken as a binding precedent case. However, as a Single Judge of this Court, I am bound by judicial discipline and I do not think it proper to declare the decisions of the Hon'ble Supreme Court in *M.B.Ramesh* and *Bharpur Singh* as *per incurium*. It is for the Hon'ble Supreme Court to render a categorical pronouncement on this issue, clarifying the controversy which still remains unsettled and different Courts are rendering contradictory views.

17 (v). In view of the above, I am unable to accept the submissions of the learned Senior Counsel Mr.S.Parthasarathy, learned Senior Counsel appearing for the appellants and consequently, in the absence of any of the attesting witness to the Will dated 30.11.1978, being examined to prove the Will, the said Will, even though was more than 30 years old at the time of



being exhibited before the Court during trial, cannot be presumed to be duly executed and attested and consequently held proved.

18. One another compelling reason for me not to follow the ratio of the three decisions that have been relied on by the learned Senior Counsel for the appellants with regard to the presumption under Section 90 of the Indian Evidence Act, being extended to Will is that even the plaintiff had relied upon a Will and even the said Will has been held to be not proved by the Courts. If really, the said Will is a true and genuine document, then it would certainly be a subsequently executed Will, thereby automatically revoking the earlier Will dated 30.11.1978. Therefore, I do not wish to extend any benefit of presumption to the earlier Will, ignoring the subsequent Will 27.04.2007, which was also produced before the Court in original and the attesting witnesses were also examined in support of due execution of the Will, though the Courts have disbelieved the said Will on the strength of the handwriting expert's opinion.

19. In view of the above discussions and the concurrent findings rendered by the Courts below being probable, fair and not being irregular,



S.A.No.789 of 2022

perverse or illegal, I do not deem it fit to interfere under Section 100 of the Code of Civil Procedure and allow the appeal. In fine, the substantial questions of law are answered against the appellants and the Second Appeal is dismissed and consequently, connected Miscellaneous Petition is closed.

No costs.

01.03.2024

Index : Yes/No
Internet : Yes/No
Neutral Citation : Yes/No.
Speaking order/Non-speaking order
rkp

To

- 1.The 4th Additional District Court, Erode District at Bhavani.
- 2.The Subordinate Court, Bhavani, Erode District.



WEB COPY



S.A.No.789 of 2019

P.B.BALAJI, J.

rkp

S.A.No.789 of 2019
and
CMP. No.15656 of 2019

01.03.2024