



S.A.(MD)Nos.229 and 641 of 2008

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 13.06.2024

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.(MD)Nos.229 and 641 of 2008

S.A.(MD)No.229 of 2008

Kannan alias Velu

... Appellant

Vs

1.Thirumalai Nambi
2.Krishnan
3.Yasothai Ammal

... Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C. against the judgment and decree of the learned First Additional District Judge, Tirunelveli in A.S.No.30 of 2005 dated 30.09.2005, confirming the judgment and decree dated 09.09.2003 in O.S.No.132 of 1985 on the file of the First Additional Sub Judge, Tirunelveli.

For Appellant : Mr.A.R.Kannappan

For Respondents : Mr.A.Arumugam for R1
Mr.D.Nallathami for R2
No Appearance for R3



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S.A.(MD)No.641 of 2008

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Thirumalainambi

... Appellant

Vs

Krishnan

... Respondent

PRAYER: Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 30.09.2005 made in A.S.No.3 of 2005 on the file of the I Additional District Court, Tirunelveli confirming the judgment and decree dated 09.09.2003 made in O.S.No.46 of 1992 on the file of the I Additional Sub Court, Tirunelveli.

For Appellant : Mr.A.Arumugam

For Respondent : Mr.D.Nallathami

COMMON JUDGMENT

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The plaintiff in the suit is the appellant. The suit was filed claiming 3/10th or 1/5th share in the suit property. The suit was dismissed by the trial Court and the findings of the trial Court were affirmed by the first appellate Court. Aggrieved by the concurrent findings, the plaintiff



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is before this Court.

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2. According to the plaintiff, the suit properties were purchased by the father of the parties viz., Subbiah Konar by utilizing the joint family nucleus. After the death of their father, the plaintiff claims 3/10th share in the suit property along with the defendants 1 and 2, who are his brothers, 3rd defendant who is his sister and 4th defendant, who is his mother. Alternatively, the plaintiff also pleaded that if the Court came to the conclusion that the suit properties were self acquired properties of the father, the plaintiff was entitled to 1/5th share.

3. The first respondent filed a written statement and the same was adopted by the 4th defendant. The suit was resisted by the defendants mainly on the ground that the suit properties were self acquired properties of Subbiah Konar and he executed a Will dated 11.04.1984, bequeathing suit property in favour of D1 and D2. The third respondent remained *ex parte*.

4. The second defendant filed a separate written statement and resisted the suit on the ground that the suit properties were self acquired properties of their father. It was also averred that the father of the parties



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purchased the properties in the name of his brother Masana Konar and the said Masana Konar executed a Will in the year 1962 in favour of the plaintiff, bequeathing the properties purchased by Subbiah Konar in his name. The Second defendant also averred that Subbiah Konar executed a Will, bequeathing the suit property, except 6th item, in favour of defendants 1 and 2. 6th item was bequeathed in favour of 4th defendant with life estate and absolute right was given in favour of the third defendant. On these pleadings, he sought for dismissal of the suit.

5. The trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the suit properties were self acquired properties of the father of the parties, Subbiah Konar. The trial Court also upheld the Will relied on by the defendants and dismissed the suit. Aggrieved by the same, the appellant herein filed an appeal in A.S.No.30/2005 on the file of I Additional District Court, Tirunelveli. The first appellate Court affirmed the findings of the trial Court. Aggrieved by the concurrent findings, the appellants are before this Court.

6. At the time admission, this Court formulated the following



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substantial questions of law by an order dated 25.02.2008:

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“1. Whether the judgment and decree of the Court below are perverse on account of its misconstruction of the document marked as Ex.B-9, the 'Will' executed by the father of the appellant?

2. Whether the findings of the Courts below with regard to the property as to whether it was the ancestral property or the self-acquired property of the father of appellant is perverse warranting interference in the second appeal?”

7. The learned counsel for the appellant vehemently contended that the father of the parties, Subbiah Konar was a literate person and he used to put his signature in the document and whereas in the Will relied on by the defendants Subbiah Konar affixed his thumb impression. The said suspicious circumstance was not properly dispelled by the propounder of the Will. The learned counsel further submitted that exclusion of the appellant from inheritance is another suspicious circumstance. The learned counsel further submitted that the conclusion reached by the Courts below that the properties were self acquired properties of Subbiah Konar is the result of non consideration of materials available on record and therefore, the said findings is also liable to be set aside.



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8. It is the specific case of the appellant that the suit properties were purchased by Subbiah Konar out of joint family nucleus. However, the plaintiff failed to lead any acceptable evidence to establish that there was income yielding joint family nucleus to enable Subbiah Konar to purchase the suit properties. On the other hand, the defendants produced the sale deed in the name of Subbiah Konar. In the sale deed, there was no reference about the purchase of properties out of joint family nucleus. Ex.B4, Ex.B8, Ex.B3, Ex.B9, Ex.B10 and Ex.B11 are the sale deeds under which the above said Subbiah Konar purchased suit properties in his individual name. When there is no acceptable evidence available on record to suggest that there was joint family nucleus capable of yielding surplus income, the Courts below are justified in coming to the conclusion that the suit properties were self acquired properties of Subbiah Konar. The said factual finding is the result of proper appreciation of exhibits viz., sale deeds in the name of Subbiah Konar.

9. The learned counsel for the appellant tried to assail the findings of the Courts below upholding the validity of the Will relied on by the defendants by pointing out two suspicious circumstances viz., affixure of thumb impression by the testator and disinheritance of the plaintiff



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without any justifiable cause.

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10. In order to prove Ex.B39, the Will relied on by the defendants, one of the attestors to the document Thiru Neelakandan, D.W.2 was examined. He cogently deposed about execution of the document. The evidence of attestor was very well corroborated by evidence of scribe of the Will viz., D.W.3. The plaintiff has not succeeded in discrediting the evidence of D.W.2 and D.W.3. Both of them clearly deposed that they had seen testator putting his thumb impression in the Will and he had also seen the attestors putting their signature in the Will. Therefore, the evidence of D.W.2 and D.W.3 is sufficient to prove proper execution of the Will. Their evidence is complementary to each other, free from any material contradictions.

11. Once the due execution of the Will is proved, it is for the propounder to dispel the suspicious circumstances surrounding the Will. In the case on hand, the affixture of thumb impression by testator and disinheritance of the plaintiff, who is one of the sons, were cited as suspicious circumstances. Though the learned counsel for the appellant vehemently contended that the testator was a literate person capable of



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putting his signature and absolutely there was no explanation for him to put his thumb impression in the will, there is no cross examination of attestor and scribe by the plaintiff in this aspect. Even P.W.1 in his evidence has not asserted that the testator used to sign and hence, there was no justification for affixing thumb impression.

12. The defendants contended that two years prior to the death of testator, his hands became shaky and hence, he was not able to sign. In such circumstances, at the time of execution of the Will, he had put his thumb impression. It was also contended by the defendants that at the relevant point of time, the testator had received money orders by affixing his thumb impression. Ex.B40 is the money order counterfoil. A perusal of the same would suggest that the testator Subbiah Konar affixed his thumb impression and received a sum of Rs.20. Therefore, Ex.B.40 proved that at the relevant point of time, the testator used to put his thumb impression in the documents. Therefore, the explanation offered by the defendants that during last days, due to weakness, Subbiah Konar hands became shaky and he used to put thumb impression in the document, is a plausible explanation.

13. Mere disinheritance of one of the heirs *per se* cannot be termed



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as a suspicious circumstance. The very purpose of execution of the Will is to deviate from succession to the estate by operation of law. In the case on hand, even in the Will, it was clearly mentioned by Subbiah Konar that he purchased some properties in the name of his brother Masana Konar and his brother executed a Will bequeathing those properties in favour of plaintiff Kannan @ Velu. It was also mentioned that the properties given to plaintiff under the Will executed by Masana Konar marked as Ex.A1 were more valuable properties than the properties covered by Ex.B39 Will. Therefore, the testator himself had offered a plausible explanation for disinheriting the plaintiff in the Will itself. In such circumstances, the defendants succeeded in dispelling both the suspicious circumstances pointed out by the appellants.

14. Taking into consideration the entire evidence available on record, especially the unimpeachable evidence of D.W.2 and D.W.3, the Courts below came to the conclusion that the Will relied on by the defendants stood proved and the said factual conclusion is based on proper appreciation of evidence available on record. Accordingly, both the substantial questions of law framed at the time of admission are answered against the appellant and in favour of the respondents. As a



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consequence, S.A.(MD)No.229 of 2008 stands dismissed. There shall be no order as to costs.

S.A.(MD)No.641 of 2008

15. S.A.(MD)No.641 of 2008 is arising out of a suit for partition in O.S.No.46 of 1992, filed by the second defendant in O.S.No.132 of 1985. The same was filed against the first defendant in O.S.No.132 of 1985 viz., Thirumalainambi. The suit was filed for partition claiming half share in the property covered by Ex.B39 Will. It is the specific contention of the second defendant, who was plaintiff in O.S.No.46 of 1992 that as per the Will executed by Subbiah Konar, the plaintiff and defendant were entitled to equal share and therefore, a decree for partition shall be passed in favour of his half share.

16. The suit was resisted by the first defendant in O.S.No.132 of 1985 mainly on the ground that the third item of the suit property was ancestral property of Subbiah Konar and therefore, he had no right to execute a Will in respect of third item. It was his contention that the Will executed by Subbiah Konar was valid only to the extent of his $\frac{1}{4}^{\text{th}}$ share



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and therefore, the plaintiff and defendants were entitled to 3/8 share each in the said item. The defendant also raised a plea of non-joinder of necessary party viz., the other sons and daughter of Subbiah Konar. As far as items 1 and 2 of the suit properties, defendant claimed those properties were partitioned in the year 1986 itself.

17. In the written statement filed by the present defendant (Thirumalainambi) in the connected suit in O.S.No.132 of 1985, it was specifically averred by him that the properties covered by the Will executed by Subbiah Konar were self acquired properties. Based on the said plea, the defendant attempted to sustain the Will executed by the Subbiah Konar in the connected suit. However, in the present suit, he raised a peculiar plea, as if third item of the suit property was not self acquired property of Subbiah Konar, but it was ancestral property. The defendant, who raised a plea that the properties covered by the Will executed by Subbiah Konar were self acquired properties and also produced evidence in support of the said Will, is not entitled to turn around and take a different stand in respect of one of the items covered by the Will.



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18. A perusal of Ex.B39-Will executed by Subbiah Konar would suggest that the present third item of the suit property with an extent of 1 acre 3 cents in S.No.620/B5 is also covered by the Will. The defendant in O.S.No.46 of 1992 was examined as D.W.1 in the joint trial along with the other suits, wherein he asserted that the suit properties were self acquired properties of his father and he purchased the suit property out of earnings from his milk business. When the defendant himself as D.W.1, clearly admitted that the suit properties were self acquired properties of his father Subbiah Konar, purchased out of earning from his milk business, the submission made by the learned counsel for the appellant, as if the third item of the suit property is the ancestral property and hence, the other sons and daughters of the Subbiah Konar shall be impleaded as parties is not acceptable to this Court.

19. As far as items 1 and 2 of the suit properties are concerned, the Courts below have given a factual finding that plea of earlier partition pleaded by the defendant was not established and hence, those properties are available for partition as per terms of Ex.B39-Will. Therefore, finding no substantial question of law to interfere with the factual findings reached by the Courts below, S.A.(MD)No.641 of 2008 also



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stands dismissed. There shall be no order as to costs.

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Neutral Citation : Yes/No

Index : Yes/No

Internet : Yes/No

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To

- 1.First Additional District Judge, Tirunelveli.
- 2.First Additional Sub Judge, Tirunelveli.
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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