



S.A.(MD)No.313 of 2006

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.07.2024

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.(MD)No.313 of 2006
and C.M.P.(MD)No.2473 of 2006

Govardhanan R.Surya

... Appellant

Vs

1.S.C.Mahalakshmi (Died)
2.Sarveswaran C.Surya
3.T.J.Gayathri
4.T.N.Banumathy
5.Homma Maheswari C.Surya
6.Vidya Sagar Prabhu C.Surya

... Respondents

*(R2 to R6 are recorded as LR's of the deceased R1
vide order dated 20.09.2011 made in S.A.(MD)No.
313/2006 (Memo USR No.3312, dated 13.09.2011))*

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 25.07.2005 passed in A.S.No.77/2003 on the file of the Second Additional Subordinate Judge, Madurai reversing the judgment and decree dated 30.01.2003 passed in O.S.No.906 of 1994 on the file of the Additional District Munsif, Madurai Town.

For Appellant : Mr.J.Barathan

For Respondents : No Appearance for to and R6
R1 Died



S.A.(MD)No.313 of 2006

WEB COPY

JUDGMENT

The defendant in the suit is the appellant. The husband and father of the respondents viz., Chandrasekaran R.Surya filed a suit for declaration of title and injunction. The suit was dismissed by the trial Court and on an appeal filed by the plaintiff, the first appellate Court reversed the findings of the trial Court and decreed the suit as prayed for. Aggrieved by the same, the sole defendant has come by way of this Second Appeal. It is also seen from the records, pending suit, the sole plaintiff Chandrasekaran R.Surya died and the respondents herein were brought on record as his legal representatives.

2. According to the plaintiff, the suit property originally belonged to the mother of deceased first plaintiff Chandrasekaran R.Surya and the defendant viz., Harilakshmi Ammal. Totally she owned 2 acres 72 cents and she gifted 73 cents in favour of her four daughters. She also had four sons viz., deceased first plaintiff, defendant, Dinakaran and one Krishnan. She died in the year 1979. After her death, the rest of the properties in the hands of Harilakshmi Ammal with an extent of 1 acre 99 cents was orally divided among her sons. The suit property with an extent of 50 cents was allotted to the share of the plaintiff. It is also



S.A.(MD)No.313 of 2006

claimed by the plaintiff that the defendant and his brothers Dinakaran and Krishnan sold away the property allotted to them in an oral partition.

It was also claimed by the plaintiff that in the absence of any documentary evidence, the patta for the suit property continued as a joint patta in the name of the plaintiff and his brothers. It was also claimed by the plaintiff that the defendant, who lost his interest in the suit property by virtue of partition, attempted to interfere with the plaintiff's peaceful possession and enjoyment and therefore, the plaintiff was constrained to file a suit for declaration and injunction.

3. The appellant/defendant filed a written statement denying the plea of oral partition made by the plaintiff. It was further claimed by the defendant that Harilakshmiammal executed a registered Will dated 10.05.1978, bequeathing the entire property available with her viz., 1 acre 99 cents in favour of the defendant and his brother Krishnan, who remained unmarried at that point of time. As per the terms of the Will, the testatrix directed the legatees to maintain the widowed sister Godhavari. The legatees were also directed to discharge the family debts. It was also claimed by the defendant that the Will was attested by his widowed sister Godhavari and one Samikannu Pillai. On these



S.A.(MD)No.313 of 2006

pleadings, the defendant sought for dismissal of the suit.

WEB COPY

4. Before the trial Court, the third plaintiff was examined as P.W.1 and a third party witness was examined as P.W.2. On behalf of the plaintiff, 22 documents were marked as Ex.A1 to Ex.A22. The defendant was examined as D.W.1. The son of deceased second attestor to the Will relied on by the defendant was examined as D.W.2. The legal practitioner, who issued notice on behalf of the plaintiff was examined as D.W.3. A Legal practitioner, who issued notice on behalf of the first attestor to the Will was examined as D.W.4. The Sub-Register's office Clerk was examined as D.W.5. On behalf of the defendants, 38 documents were marked as Ex.B1 to Ex.B38.

5. The trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the oral partition pleaded by the plaintiff was not proved. The trial Court also upheld the validity of the Will relied on by the defendant and consequently, suit was dismissed. Aggrieved by the same, the plaintiffs preferred an appeal in A.S.77 of 2003 on the file of Principal Sub Court, Madurai. The first appellate Court, on re-appreciation of evidence came



S.A.(MD)No.313 of 2006

to the conclusion that the oral partition pleaded by the plaintiff was proved. The first appellate Court also rendered a finding that the Will relied on by the defendant was not proved in accordance with law. Therefore, the first appellate Court reversed the findings of the trial Court and allowed the appeal. Aggrieved by the same, the defendant is before this Court.

6. At the time of admission, this Court formulated the following substantial questions of law, by an order dated 21.04.2006:

“(i) Whether the lower appellate Court committed an illegality in not following the well settled principle that the plaintiff has to succeed or fail on his own case and he cannot hope to succeed on the defendant's case?”

“(ii) When the plaintiff failed to prove his case or oral partition either on documentary evidence or on oral evidence, whether the lower appellate Court has acted perversely in granting a decree of declaration of plaintiff's title observing that the defendant has not proved his case by proving the registered Will Exhibit B5?”

“(iii) Whether the lower appellate Court has committed an error of law in failing to consider the mode of proof of the signature of attestors envisaged in Section 69 of Evidence Act, where attestors had died and to analyze whether the defendant's evidence fulfils the requirement of Section 69 of Evidence Act?”



S.A.(MD)No.313 of 2006

(iv) Whether the finding of the lower appellate Court is perverse and an error of law when it rejects the evidence of D.W.2 to 5 on the ground that they did not see the execution of the Will, whereas they were examined for the purpose of fulfilling the requirements and mode of proof of the signature of the attestors of the Will-Exhibit B5, under Section 69 of Evidence Act?

(v) Whether the lower appellate Court committed an error of law when it failed to consider and apply the ratio in the rulings cited by the defendant regarding the proof to be adduced when attestors had died and regarding registration of the deed being prima facie evidence of execution when attestors had died?"

7. The learned counsel appearing for the appellant submitted that the oral partition pleaded by the plaintiff was not at all proved by leading any acceptable evidence and hence, the findings rendered by the first appellate Court as if oral partition was proved is vitiated by perversity. The learned counsel further submitted that the Will relied on by the defendant was proved by following the procedure under Section 69 of the Indian Evidence Act and the first appellate Court misunderstood the scope of Section 69 of the Indian Evidence Act, 1872 and came to an erroneous conclusion that the Will was not proved.



S.A.(MD)No.313 of 2006

8. The plaintiff came to the Court with a specific plea that after the death of mother of the parties, there was a oral partition among the brothers and the suit property was allotted to the plaintiff towards his 1/4th share. In order to prove oral partition, the third plaintiff examined himself as P.W.1 and he examined one Pathi as P.W.2 to prove oral partition. Though P.W.2 in his evidence claimed that he was present at the time of oral partition and he was aware of the same, the presence of P.W.2 was not mentioned in the plaint.

9. It is alleged by the plaintiff in the plaint that his mother settled 73 cents of land in favour of her daughters and the remaining property was partitioned after her death. When P.W.2 was cross examined with regard to the rest of the properties of mother, he expressed his ignorance about the other properties of mother. Therefore, P.W.2 appears to be a person not well acquainted with the affairs of the plaintiff's family and his presence at the time of alleged partition is doubtful. At the most, P.W. 2 is appeared to be a chance witness.

10. The plaintiff failed to lead any documentary evidence to suggest that the oral partition was acted upon and the parties to the



S.A.(MD)No.313 of 2006

alleged partition enjoyed their respective shares allotted under the oral partition. Even in the averments it was admitted by the plaintiff that patta for the suit property continued as a joint patta in the name of the plaintiff and other brothers, no attempt was made by the parties to mutate their names in the revenue records. Therefore, the oral partition pleaded by the plaintiff is highly doubtful and the same is not proved in accordance with law. Ex.A2 is the patta produced by the plaintiff wherein the name of the plaintiff is found along with the other brothers. However, Ex.B8 is the patta issued by the Tahsildar dated 17.08.1982, wherein the names of the defendant and Krishanan (legatees under the Will) alone mentioned as pattathars of the suit property.

11. It is stated by the learned counsel for the appellant that under Ex.A2, the plaintiff has granted permission to include his name in the joint patta and the said order was challenged by the defendant in an appeal before the Revenue Divisional Officer and the said appeal was allowed. The order passed by the Thasildar in the year 1993 for inclusion of plaintiff's name in the joint patta was cancelled and the earlier order passed by the Tahsildar granting patta in the name of defendant and his brother Krishnan [legatees under the Will] was



S.A.(MD)No.313 of 2006

restored. The order passed by the Revenue Divisional Officer in an appeal was marked as Ex.B23. Therefore, it is clear patta for the said property stands in the name of the defendant and his brother Krishnan. The plaintiff has not produced any patta exclusively in his name and therefore, the claim made by him as if the suit property was orally partitioned and allotted to his share is not acceptable to this Court. The findings rendered by the first appellate Court with regard to the oral partition based on oral evidence of P.W.1 and P.W.2 is vitiated by non-consideration of Ex.A2, Ex.B8 and Ex.B23. However, as mentioned earlier, the evidence of P.W.2 is not reliable. In such circumstances, the finding rendered by the first appellate Court as if the oral partition pleaded by the plaintiff was proved is liable to be set aside.

12. The learned counsel for the appellant vehemently contended that the Will relied on by the defendant marked as Ex.B5 was properly proved by examining the persons, who were acquainted with the signature of the attestors, who attested the document. It is not in dispute both the attestors to the Will were dead at the time of trial. Therefore, the defendant resorted to the procedure under Section 69 of the Indian Evidence Act, 1872. In order to prove the signature of the attestors



S.A.(MD)No.313 of 2006

found in the Will, the persons, who are acquainted with their signature and handwriting, were examined as D.W.2 and D.W.4. D.W.2 is the son of Samikannu Pillai, the second attester in the Will. SSLC book of D.W. 2 was marked as Ex.B35 and signature of his father Samikannu Pillai found thereon was marked as Ex.B36. Ex.B5 Will was shown to the witness and he identified the signature of the second attester Samikannu Pillai as that of his father's signature. Therefore, by following the procedure under Section 69 of the Indian Evidence Act, 1872, the defendant proved the signature of one of the attestors viz., Samikannu Pillai by evidence of D.W.2. In order to prove the signature of other attester viz., Godhavari, a legal practitioner who issued notice on behalf of her was examined as D.W.4. However, he did not identify the signature of Godhavari found in the Will. Therefore, the evidence of D.W.4 is not useful to prove the attestation by Godhavari. Though proof of attestation by one of the attestors under Section 69 of the Indian Evidence Act, 1872 is one step towards proof of will, the propounder failed to lead any evidence to prove that the thump impression found in the Will was that of testatrix. Therefore, second condition under Section 69 of the Indian Evidence Act, 1872 is not satisfied. In other words, the propounder failed to prove that signature of the testatrix executing the



S.A.(MD)No.313 of 2006

Will was in the handwriting of that person.

WEB COPY

13. It is settled law, it is incumbent on the propounder of the Will to prove the Will under Sections 68 and 69 of the Indian Evidence Act, 1872 and it is also his duty to dispel the suspicious circumstances surrounding the Will. In the case on hand, the testatrix put her thumb impression in the Will. In order to prove that Harilakshmi Ammal was a literate, the mortgage deed 11.02.1959 executed by her dated was marked as Ex.A14. Therefore, it is clear that the testatrix was a literate and she signed the mortgage deed. In Ex.B5 Will she only affixed her thumb impression. The propounder has not offered any acceptable reason for her failure to put her signature in the testamentary document. The failure of the testatrix to put her signature in the testamentary document is a serious suspicious circumstance and the same has not been dispelled. The fact of affixture of thumb impression will also creates serious doubt with regard to the testamentary capacity of the testatrix. Therefore, the propounder failed to dispel the suspicious circumstances surrounding the Will and as a consequence, I agree with the findings of the first appellate Court that the defendant failed to prove the execution of the Will, on different reasonings. The substantial questions of law (ii) to (v) are



S.A.(MD)No.313 of 2006

answered accordingly against the appellant and in favour of the respondents.

14. In view of the discussion made earlier, the plaintiff failed to prove the plea of oral partition and therefore, the substantial question of law (i) is answered in favour of the appellant and against the respondents. Unless, the oral partition pleaded by the plaintiff is proved, the plaintiff is not entitled to get a decree for declaration of his exclusive title over the suit property and consequential injunction. Therefore, the second appeal is allowed and the judgment and decree passed by the first appellate Court is set aside. The judgment and decree passed by the trial Court is restored. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

vsm
NCC : Yes / No
Index : Yes / No

26.07.2024



WEB COPY

To



S.A.(MD)No.313 of 2006

- 1.II Additional Subordinate Judge, Madurai.
- 2.The Additional District Munsif, Madurai.
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



S.A.(MD)No.313 of 2006

S.SOUNTHAR, J.

vsm

S.A.(MD)No.313 of 2006

26.07.2024