



S.A(MD)No.158 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.07.2024

Pronounced on : 07.08.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.VADAMALAI

S.A(MD)No.158 of 2018

S.Manimaran

... Appellant/Appellant/
Plaintiff

Vs.

1. S.Murali

2. M.Bama

3. The Joint Sub Registrar No.1,
Kumbakonam.

4. Government of Tamilnadu,
through its District Collector,
Thanjavur.

... Respondents/Respondents/
Defendants

PRAYER :-

This Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 23.11.2017 made in A.S.No.32 of 2017 on the file of the Additional District Judge (Fast Track Court), Kumbakonam, confirming the judgment and decree dated 19.04.2017 made in O.S.No.136 of 2015 on the file of the Additional Subordinate Judge, Kumbakonam.



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For Appellant : Mr.P.Thiagarajan
For R1 & R2 : Mr.H.Lakshmi Shankar
For R3 & R4 : Mr.V.Muthuvijayan
Special Government Pleader

JUDGMENT

This Second Appeal is preferred against the judgment and decree dated 23.11.2017 made in A.S.No.32 of 2017 on the file of the learned Additional District Judge (Fast Track Court), Kumbakonam confirming the judgment and decree dated 19.04.2017 passed in O.S.No.136 of 2015 on the file of the learned Additional Sub Judge, Kumbakonam.

2. The appellant is the plaintiff and the respondents are the defendants in O.S.No.136 of 2015 on the file of the Additional Sub Court, Kumbakonam. The appellant/plaintiff filed the suit for partition and permanent injunction in respect of the suit property.

3. For the sake of convenience, the parties are referred as plaintiff and defendants as arrayed in O.S.No.136 of 2015 on the file of the Additional Sub Court, Kumbakonam.



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4. Case of the plaintiff:

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The plaintiff and the 1st defendant are sons of one Swamyraj. Their father Swamyraj got the suit property in a compromise decree passed in O.S.No.241 of 1993 on the file of the Sub Court, Kumbakonam. The suit in O.S.No.241 of 1993 was filed for partition among Swamyraj and his two sons, viz., the plaintiff and the 1st defendant. Swamyraj died intestate on 13.03.2008 and after his death, the plaintiff and the 1st defendant became owners of the suit properties by inheritance. After a few years, due to difference of opinion, the 1st defendant tried to alienate the suit property in August 2009. So, the plaintiff sent letters to revenue authorities not to make any sub division and name changes in the revenue records. The 1st defendant claimed that their father Swamyraj executed a Will, dated 27.05.1998 in his favour. The Will is not true and genuine one. Swamyraj had no intention to give the suit properties to the 1st defendant. The 1st defendant executed a settlement in favour of his wife, the 2nd defendant herein. The plaintiff demanded the 1st defendant for amicable partition on 10.05.2015, but the 1st defendant refused. Hence, the suit is filed for partition and injunction.



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5. Case of Defendants 1 and 2:

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It is true that the suit properties are absolute properties of the father of the plaintiff and the 1st defendant, namely Swamyraj as per the compromise decree passed in O.S.No.241 of 1993. It is not true that the suit properties are jointly owned by the plaintiff and the 1st defendant. Swamyraj executed a Will, dated 27.05.1998 in favour of the 1st defendant in a sound and disposing state of mind. He died on 13.03.2008. The 1st defendant executed a settlement in favour of his wife S.Bama, 2nd defendant through a registered settlement deed. The plaintiff neglected his father and mother. The parent lived in the custody of the 1st defendant. The Will dated 27.05.1998 executed by Swamyraj is a true and genuine one. The plaintiff has no right over the suit properties. There is no cause of action for the suit. The defendants 3 and 4 are government officials. Without notice under Section 80 of the Civil Procedure Code, the suit is not maintainable. Hence, the suit is liable to be dismissed.

6. Case of the 3rd & 4th defendant:-

The plaintiff unnecessarily impleaded the defendants 3 and 4 in this suit. The plaintiff has no cause of action against these defendants. Without



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notice under Section 80 of the Civil Procedure Code, the suit is liable to be dismissed.

7. During trial, on the plaintiff side one witness was examined as P.W.1 and marked exhibits as Ex.A.1 to Ex.A.5. On the side of the defendants four witnesses were examined as D.W.1 to D.W.4 and 14 exhibits Ex.B.1 to Ex.B14 were marked and Ex.X.1 & Ex.X.2 were also marked.

8. After hearing both sides, the learned Additional Sub Judge, Kumbakonam dismissed the suit in O.S.No.136 of 2015 by passing judgment and decree dated 19.04.2017. Aggrieved by the judgment and decree, the plaintiff preferred the Civil Appeal in A.S.No.32 of 2017 before the Additional District Court (Fast Track Court), Kumbakonam. The first Appellate Court after hearing both sides, passed judgment dated 23.11.2017 dismissing the appeal and confirmed the judgment and decree passed in O.S.No.136 of 2015.



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9. Challenging the judgment and decree of the First Appellate Court, the defendants preferred this Second Appeal and the same has been admitted for file on 04.06.2018 on the following substantial questions of law:-

" i) Whether the Courts below are right in dismissing the suit on the basis of Ex.B.1 - Will, without framing an issue with regard to Ex.B.1 - Will?

ii) When the attesting witnesses of Ex.B.1 - Will, D.W.2 and D.W.3 given evidence contrary to each other with respect of to their attestation of Will and as such whether it can be accepted as proved as required under Section 63 of Indian Succession Act and Section 68 of Indian Evidence Act.

iii) When the present suit is only for partition, whether the finding of the Courts below that the suit is barred by the law of limitation as it has been filed after the period of 3 years from the date of death of Father on 13.03.2008."

10. Heard both sides and perused the records in this Second Appeal. Both sides have argued at length and respondents 1 & 2 filed their written submissions.



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11. The learned counsel for the appellant/plaintiff has submitted that the suit properties are absolute properties of the father of the plaintiff and the 1st defendant, namely Swamyraj as per the compromise decree in O.S.No. 241 of 1993 and Swamyraj died intestate on 13.03.2008. The 1st defendant claims that their father executed Ex.B.1 - Will in his favour. The Will is not genuine. The alleged Ex.B.1 - Will was executed on 27.05.1998, however, it was registered on 01.06.1998. Further, as per the contents of Ex.B.1 - Will, there was an earlier Will of the year 1994 and the same was cancelled. According to 1st defendant, he filed a suit in the year 1993 as O.S.No.241 of 1993, after that the earlier Will of the year 1994 has not been disclosed. The attestors to the Ex.B.1 - Will are friends of the 1st defendant. They have also deposed in a contradictory manner. The Trial Court has not framed a separate “Issue” regarding Ex.B.1 - Will. The 1st defendant has to prove the due execution of Will and attestation of Will as per Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act. There are suspicious circumstances surrounded over the Will under which one of the sharers is excluded from getting a share. In order to defeat the right of the plaintiff over the suit properties, the Ex.B.1 - Will was created or by undue



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influence taking advantage of the fact that their father was with the 1st defendant till his last breath. In the compromise decree passed in O.S.No. 241 of 1993 the plaintiff herein was allotted a lesser extent whereas the 1st defendant and their father retained a larger extent than that of the plaintiff herein and hence, no father wanted to give away the entire properties left by him to one of the sons ignoring the other son. As per the evidences of attesting witnesses that they have not seen the testator's signing the Ex.B.1 - Will. The Courts below erred in appreciating the evidences. The 1st defendant making use of his friends created Ex.B.1 - Will and tried to sweep away the entire suit properties left by their father. The Courts below have not considered the entire evidences and negative the relief of partition on the basis of unproved Will - Ex.B.1 and also barred by limitation. There is no bar for claiming relief of partition. Therefore, the Second Appeal may be allowed.

12. Per contra, the learned counsel for the respondents 1 & 2/defendants 1 and 2 has contended that, as per the compromise decree passed in O.S.No. 241 of 1993, one part of the property in T.S.Nos.1900 and 1910 was allotted to the share of the 1st defendant and another part of the property was allotted



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to their father Swamyraj, who during his life time executed Ex.B.1 - Will in respect of his part of property in favour of the 1st defendant. Ex.B.1 - Will was executed on 27.05.1998 and their father died on 13.03.2008, after 10 years from the date of Will. After the demise of father and mother, the 1st defendant is absolute owner of the suit property, which is part of property in T.S.Nos.1900 and 1910 allotted to their father. In the year 2009, the 1st defendant disclosed about the existence of Will by sending caveat petition to the plaintiff. So, the plaintiff has absolute knowledge of the Will. The plaintiff is also one of the party to that suit and compromise decree, so he cannot go beyond the compromise decree. The main contention of the plaintiff is that there was no issue framed regarding Ex.B.1 - Will. But, the trial Court has elaborately made discussion about the Ex.B.1 - Will and found that the Will was proved by the 1st defendant. Moreover, the first Appellate Court framed points for consideration as 'whether the Ex.B.1 - Will is true, valid and it comes into force' and after appreciation of evidence, came to the conclusion that the Will is true and came into force and hence, the 1st Appellate Court rectified the alleged omission made by the trial Court. This principle was laid down in **2016 (6) CTC 848 (Kader Pathu and Ors.**



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vs. Ayisha Gani (died) and Ors.). Therefore, the non framing of issue regarding the Will by the Trial Court is not fatal to the case of the defendants as per reported decisions in **2016 (6) CTC 433 (Kalyanasundaram vs. M.Kumaravel), 2009 (2) CTC 452 (SC) (Bhuvan Singh vs. Oriental Insurance Company Limited) and 2016 (6) CTC 806 (N.Velu Vs. G.Velu and Ors.)**

13. The learned counsel for the defendants 1 & 2 would further submit that the other grounds of plaintiff is that the evidences of attestator are contradictory with each other and they are friends of the 1st defendant. The factual findings of the trial Court as well as the first Appellate Court are based on the evidence on record. There is no perversity or erroneous approach of misreading vital evidence that has been pointed out in the Second Appeal by the plaintiff except self serving argument. Since there are minor discrepancies of evidence of D.W.2 and D.W.3 they have been ignored by the Courts below on considering their evidence in entirety and came to the conclusion that the Will was proved. In **2005 (1) SCC 280 (Meenakshiammal (Dead) through LRs. and Ors. vs. Chandrasekaran**



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and Ors.), it was held that “any suspicion alleged must be one inherent in the transaction itself rather than it arising from a conflict of testimony which becomes apparent on the investigation of transaction.” As per evidence of D.W.2 and D.W.3, they are identifying witnesses. As per the plaintiff’s case, he was aware of the Will in 2009 itself under Ex.A.4 and Ex.A.5 caveat. The plaintiff accepts the signature of their father in the Will and there is no plea averred in the plaint attacking the mental capacity of their father Swamyraj at the time of execution of the Will and his signature is also not disputed. The conduct of the plaintiff in not challenging or questioning the Will nearly 6 years from 2009 is noteworthy. After execution of Will, their father Swamyraj lived for 10 years and he never thought of revoking the registered Will. There is no plea in the plaint that the Will was obtained by threat, coercion, undue influence, misrepresentation or by playing fraud. D.W.2 and D.W.3 attestators to the Will, clearly deposed about the preparation of Will and signature of the testator and their sign in the Will. And also they signed in continuation of Swamyraj signature. They were cross examined by the plaintiff in respect of execution, attestation, registration and their signature. So, their evidence is more sufficient to establish the Will executed by Swamyraj. Basic things were not challenged by the plaintiff. This is exactly



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inconsonance with Section 63(c) of the Indian Succession Act. Both attestators clearly deposed about the execution of Will and their attestation. Hence, the Will was clearly proved and the Courts below correctly came to the conclusion.

14. The learned counsel for the respondents 1 & 2/defendants 1 & 2 would further submit that the Courts below correctly appreciated the evidences adduced on either side and correctly passed judgment and decree in favour of the defendants 1 & 2. Both the Courts below have given the same finding favoring the defendants. Concurrent findings could not be set aside unless the question of law decided favouring the appellant in the Second Appeal. In this case, the question of law could not be decided in favour of the appellant as they were factually decided by the Courts below. Therefore, this Second Appeal may be dismissed.

15. It is the case of the plaintiff that the suit properties and other properties were the subject matter of O.S.No.241 of 1993 filed by the 1st defendant against his father Swamyraj and the plaintiff. In that suit, a compromise decree was passed as seen from Ex.A.1. The suit property was



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allotted to the father of the parties namely Swamyraj. This was not disputed by both. During argument, it was placed by the plaintiff that the plaintiff was allotted a lesser share in the suit in O.S.No.241 of 1993 and so his father Swamyraj did not intend to execute a Will in favour of the 1st defendant alone. In that suit, compromise decree was passed and the plaintiff also participated in the compromise and signed therein, so he could not question about the allotment of shares as lesser shares. He would have been challenged at that time during passing compromise decree and by preferring appeal as per law. Keeping mum all these years, he is estopped to raise such contention in this second appeal.

16. It is the case of the plaintiff that, after the demise of their father Swamyraj, the plaintiff sought for partition. The 1st defendant stated that during his life time their father Swamyraj executed Ex.B.1 - Will in favour of the 1st defendant and even before filing of the suit, the 1st defendant brought the knowledge of Will through Ex.A.4 and Ex.A5 caveat petitions. The service of the caveat petition was not disputed by the plaintiff.

17. On perusal of judgments of the Courts below, it is revealed that the Courts below elaborately discussed about the Ex.B.1 - Will in question and held that it has been proved by the 1st defendant. The trial Court discussed



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about the ingredients of Section 63 of the Indian Succession Act in paragraph No.12 of its judgment. The 1st defendant also examined the attestors of the Will as D.W.2 and D.W.3. The trial Court also appreciated their evidence and based on their evidence took the decision that the Will was proved. Admittedly, the parents of the plaintiff and the 1st defendant were living with the 1st defendant till their death and the plaintiff did not take care of parents. So, the case of the 1st defendant that their father executed a Will in favour of the 1st defendant is acceptable. Moreover, the 1st defendant filed an additional typed set wherein the Will is annexed. It clearly mentioned in the Will that the 1st defendant and his wife were maintaining the parents of the plaintiff and the 1st defendant, with due love and affection. This was not disputed or challenged by the plaintiff. It is the argument of the plaintiff that the trial Court has not framed specific issues regarding the Will as to whether the Will is genuine or not true. The 1st defendant replied that the plaintiff has not challenged the Will though he disclosed the Will in his caveat petition and also not averred that it was created by playing fraud.

18. On perusal of the judgment, the trial Court has elaborately discussed about the Will and held that the Will was proved, though there was



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no specific issue regarding the genuineness of Will. However, the 1st Appellate Court has framed points for consideration under Point No.1 "Whether the Ex.B.1 - Will is true, valid and had it come into force" and after elaborate discussion held that Ex.B.1 is true and valid. So, as rightly contended by the 1st defendant the first Appellate Court rectified the alleged omission made by the trial Court as settled principle laid down in **2016 (6) CTC 848 (Kader Pathu and Ors. vs. Ayisha Gani (died) and Ors.)** It is also a settled proposition of law that

“while the parties are aware of the dispute and let in evidence in support of the contention, mere omission to frame issue on the matter in controversy between the parties cannot be regarded as fatal.”

In the facts and circumstances of the case, the Ex.B.1 was proved by the 1st defendant as held by the Courts below and there is no error of finding in this regard. So, the 1st question of law is answered against the appellant/plaintiff.

19. The next contention raised by the plaintiff is that the attestors D.W.2 and D.W.3 were deposed in a contradictory manner. On perusal of the



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evidence of D.W.2 and D.W.3, they have deposed after more than 15 years of Will and they clearly deposed about the preparation of the Will, signature made by the testator and also they signed the Will, after the signature of the testator. Mere few contradictions will not be a ground to throw their evidence in toto. The evidence in entirety will prove the execution of Will as rightly argued by the 1st defendant and the plaintiff did not raise that the D.W.2 and D.W.3 have not put their signature or the signature of the testator is forged. The Courts below have discussed about the evidences of D.W.2 and D.W.3 about the execution of Will - Ex.B.1 and came to the correct conclusion that their evidence is sufficient to establish the Will. The plaintiff has not specifically challenged their attestation during cross examination in respect of any fraud in the execution of Will. Admittedly, Ex.B.1 - Will was executed on 27.05.1998 and the testator Swamyraj died on 13.03.2008. After execution of Will, Swamyraj lived for nearly 10 years and after his death the mother of the parties died in the year 2012. There is no dispute in it. The 1st defendant disclosed about the execution of Will in the year 2009. If the Will is to be alleged as not true one, why the plaintiff has not taken hectic steps to challenge the Will while admittedly their mother was alive till the filing of the suit? These are all would establish that the will was genuine one.



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Hence, the 2nd question of law framed in this appeal is negatived against the appellant/plaintiff.

20. The next contention is that there is no limitation for partition suit, but the Courts below wrongly held that the suit is barred by limitation. The 1st defendant stated that Ex.B.1 - Will was executed in the year 1998 and the testator died in the year 2008. Admittedly, the 1st defendant brought the existence of Will to the plaintiff by sending caveat petition Ex.A.4 and Ex.A.5. The 1st defendant states that he is the absolute owner of the property. Since the plaintiff has knowledge about the Will in the 1st week of August 2009, has not challenged the Will within a period of 3 years inspite of denial of his right. In such circumstances, the Court below correctly held that the plaint is barred by limitation. The 3rd question of law is answered against the appellant/plaintiff.

21. As stated supra, the Courts below correctly applied and understood Section 63 of the Indian Succession Act and also Section 68 of the Indian Evidence Act and correctly came to a conclusion in favour of the defendants 1 & 2. Therefore, this Court holds that Ex.B.1 - Will has been proved by



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acceptable evidence as contemplated under the law and the plaintiff cannot seek any relief of partition against the absolute property of the 1st defendant.

The Courts below have properly appreciated the evidences taking into consideration of the settled legal principles in this regard. The citations relied on by the respondents/defendants are applicable to the facts and circumstances of the case. Hence, all the questions of law raised in this Second Appeal are answered against the appellant/defendant. Thus, this Second Appeal fails.

22. In the result, the Second Appeal is dismissed. The judgment and decree dated 23.11.2017 made in A.S.No.32 of 2017 on the file of the learned Additional District Judge (Fast Track Court), Kumbakonam, confirming the judgment and decree dated 19.04.2017 passed in O.S.No.136 of 2015 on the file of the learned Additional Sub Judge, Kumbakonam are confirmed. No costs.

07.08.2024

NCC : Yes / No
Internet : Yes / No
Index : Yes / No
VSD

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To

- 1.The Additional District Judge (Fast Track Court),
Kumbakonam.
- 2.The Additional Subordinate Judge,
Kumbakonam.
- 3.The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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P.VADAMALAI, J.

VSD

Pre-Delivery Judgment made in
S.A(MD)No.158 of 2018

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