



S.A(MD)No.441 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

<i>Judgment Reserved On</i>	<i>Judgment Pronounced On</i>
29.11.2023	31.01.2024

CORAM

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

S.A.(MD).No.441 of 2019

R.Subbiah [Died]

2. S.Lakshmi

3. S.Vimala

4. N.Indrani

... Appellants

[A-2 to A-5 are brought on record as Legal representatives of the deceased sole Appellant, vide Order of this Court, dated 21.02.2020]

/Vs./

Muthuvalliammal

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code to against the Decree and Judgment passed in A.S.No.4 of 2016 dated 05.04.2017 on the file of the I Additional District Court, Tuticorin thereby reversing the Judgment and Decree of the Learned Subordinate Judge, Kovilpatti dated 21.07.2015 in O.S.No.25 of 2012.

For Appellants : Mr.P.Gunasekaran

For Respondent : Mr.H.Arumugam



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JUDGMENT

This Second Appeal is filed against the Judgment and Decree, dated 05.04.2017 passed in A.S.No.4 of 2016 reversing the Judgment and Decree of the Sub Court, Kovilpatti, dated 21.07.2015 in OS.No.25 of 2012.

2. Heard Mr.P.Gunasekaran, the Learned Counsel appearing for the Appellants, Mr.H.Arumugam, the Learned counsel appearing for the Respondent and perused the material documents available on record.

3. The Plaintiff is the Appellant and the Defendant is the Respondent herein. For the sake of convenience, the parties shall be referred as Plaintiff and Defendant based on the ranking in the suit. Since the sole Plaintiff died, his Legal heirs were added as Appellant Nos.2 to 5.

4. The plaintiff has filed the suit for declaration and to evict the defendant from the suit property within the stipulated time and the same was decreed in favour of the plaintiff. Aggrieved over the same, the defendant has



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preferred an appeal before the Appellate Court. The Appellate Court has allowed the appeal and dismissed the suit. Aggrieved over the same, the plaintiff has preferred this Second Appeal.

5. The plaintiff and the defendant are brother and sister. Apart from them there are three brothers and another sister. In short there are four brothers and two sisters. The contention of the plaintiff is that the suit property belongs to their parents. The suit property was purchased by their father, subsequently a portion of the suit property was sold to the mother. The father subsequently executed a Will dated 07.08.1989 for the entire extent of the property, which includes that portion which was sold to the mother as well. Through the said Will dated 07.08.1989, several properties were shown and the A, B, C, D schedule properties were bequeathed to the four sons, however it shall come into effect after the demise of both the mother and father. In short, all the properties were retained by the father until his death and also by giving life estate to the mother through the Will. But the daughters were not bequeathed with any property. The contention of the defendant / daughter is that the suit schedule property was given as Sridhana during her marriage. Further, the daughter submitted that when



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the father has sold the property to the mother, then the father has no right to execute a Will by including the sold property. After hearing the rival claims, the Trial Court had relied on the Will and has held that the plaintiff is entitled to the suit property. The Trial Court has also relied on the deposition of the other beneficiaries (other brothers) in the Will, namely, Perumal (3rd son) and Ramachandran (1st son), who had deposed before the Courts that the father had executed the Will and all the sons are the beneficiaries of the Will. Based on the evidence, deposition the Trial Court had allowed the suit.

6. Aggrieved over the same the defendant had preferred an appeal before the Appellate Court. Before the Appellate Court a plea was taken that the plaintiff has not produced the original Will and it is only the attested copy of the Will was produced. While proving a Will original has to be submitted and the secondary evidence cannot be taken into account. If secondary evidence ought to be accepted, then the plaintiff ought to have pleaded that he is not in possession of the copy of the Original Will and he should also disclose who is in possession of the Will and called upon that person to produce the Will before the Court. Accepting the contention, the Appellate Court had reversed the Judgment of the



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Trial Court and dismissed the suit. Aggrieved over the same, the plaintiff is before this Court.

7. The second appeal was admitted on the following Substantial Questions of Law.

1. Whether the Judgment of the lower Appellate Court is perverse and liable to be set aside?

2. When the execution of Will dated 07.08.1989 executed by Ramasamy Reddiar was admitted by D.W.1, D.W.2 & D.W.3 whether the Judgment of the first appellate court in reversing the Judgment of the lower Court is correct?

3. When the D.W.2 & D.W.3 are the beneficiaries to the Will dated 07.08.1989 and got mutated all the revenue records devolved on them through the very same Will, Whether the Judgment and Decree of the First Appellate Court had ignored the fact that the D.W.2 & D.W.3 estopped from denying the said Will?

4. Whether the Judgment and Decree of the First Appellate Court is right when admission is made by D.W.



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1, D.W.2, D.W.3 regarding the execution of Will, dated 07.08.1989, the same requires no proof in view of Section 58 of Indian Evidence Act, 1872?

8. The Substantial Question of Law that ought to be considered is when the D.W.1 who is the defendant herself and D.W.2 who is the sibling (3rd son) and D.W.3 who is another sibling (1st son) had admitted the execution of the Will, in such circumstances, whether the Appellate Court right in reversing the Judgment or disbelieving the execution of Will. When the D.W.2 & D.W.3 are the beneficiaries of the Will and has got mutated all the revenue records in their name based on the Will, whether the Appellate Court is right in ignoring the evidence of D.W.2 & D.W.3. Moreover, the witnesses are also estopped from denying the execution of the said Will. When the D.W1 to D.W.3 had admitted the execution of Will, Whether the same requires any proof in view of the Section of 58 of the Indian Evidence Act. But before answering the above substantial question of law, the basic question before this Court is that the plaintiff has produced only the certified copy issued by the registration department. The plaintiff has not pleaded that he could not produce the original copy. There is no averment in the plaint that he is not in possession of the original Will and has not



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disclosed who is in possession of the original Will. But in the deposition, it is stated that the original will is with the elder brother. And the same ought to be rejected since without pleading the same cannot be accepted. It is settled law that a certified copy only secondary evidence and if the secondary evidence has to be accepted, then the plaintiff should plead and prove that he is not in possession of the Original Will and ought to have disclose the name who is in possession of the original Will. Therefore, the Secondary evidence cannot be accepted and consequently the Will is not proved.

9. The issue of secondary evidence was considered in the Judgment rendered by the Hon'ble Supreme Court in the case of ***Jagmail Singh and Another Vs. Karamjit Singh and Others, reported in (2020) 5 Supreme Court Cases 178***, wherein it is held as under:

...

11. A perusal of Section 65 makes it clear that secondary evidence may be given with regard to existence, condition of the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after



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notice mentioned in Section 60 such person does not produce it. It is a settled position of law that for secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original evidence has not been furnished.

12. ...

13. *In the matter of Rakesh Mohindra V. Anita Beri this Court has observed as under:*

“15. The preconditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original document is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot be accepted.”

14..., 15..., 16...

17. Needless to observe that merely the admission in evidence and making exhibit of a document does not prove it automatically unless the same has been proved in accordance with the law.



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10. In the present case, the plaintiff has not averred in his plaint that why he could not produce the original evidence. Normally, if it is not pleaded, then the case of the plaintiff ought to be dismissed. But in the present case, the other three beneficiaries are not before this Court. If the suit is dismissed, it would amount to the Will is not proved. But other three beneficiaries would be affected and the Judgment would be passed behind their back. Therefore, it is just necessary to set aside the Judgment and Decree of the Appellate Court and the Trial Court and remit the matter to the Trial Court for giving opportunity to the other beneficiaries.

11. The defendant has taken a plea before the trial Court that the suit property was given to her as Sridhana at the time of her marriage. Except for the bare statement, the defendant has not proved that property was given to her as Sridhana. Even for the sake of argument, if it is accepted the suit property was given as Sridhana, the defendant has not mutated in the revenue records and the Patta is not in her name. Further the defendant has not preferred any appeal against the adverse finding which she had suffered. In such circumstances, the plea of the defendant that it is a Sridhana property has attained finality.



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12. For the reasons stated supra, this Court is of the considered opinion that the case ought to be remitted back for a limited purpose to prove the Will alone. Therefore, this Court is setting aside the Judgment and Decree, dated 05.04.2017 passed in A.S.No.4 of 2016 and the Judgment and Decree of the Sub Court, Kovilpatti, dated 21.07.2015 passed in O.S.No.25 of 2012 as far as the finding of Will alone. The plaintiff is directed to implead his brothers in the suit and amend the pleadings in the plaint and shall disclose who is in possession of the original Will and thereafter the parties are at liberty to prove the Will. Hence this matter is remitted back to the Trial Court to the limited extent to prove the original Will alone, since this is only to give an opportunity to the other brothers who are beneficiaries under the Will. The plaintiff is also given opportunity to disclose the name of person who is in possession of the Will and to call upon him to produce the original Will.



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13. With the aforesaid observations, this Second Appeal is partly allowed with the above terms. No Costs.

31.01.2024

Index : Yes / No
NCC : Yes / No
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TO:

1. The I Additional District Court,
Tuticorin.
2. The Subordinate Court,
Kovilpatti.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J

ksa

Order made in
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