



IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 27.02.2025
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THE HONOURABLE MRS. JUSTICE R. KALAIMATHI

SA NO. 489 of 2011

1. P.Tamilarasan

2.P.Vetrivel

3.P.Manimegalai

.....Appellants

Vs

P.Sundari

..... Respondent

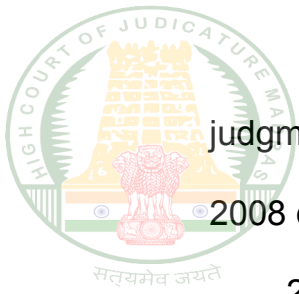
PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree passed in A.S.No.12 of 2010 dated 14.12.2010 by the Principal District Judge, Chengalpattu confirming the judgment and decree in O.S.No. 31 of 2008 dated 24.11.2009 on the file of the Sub Court, Tambaram and dismiss the suit filed by the respondent.

For Appellant(s) : Mr. R. Vijayakumar

For Respondent(s) : Mr.S.Kingston Jerold

JUDGMENT

This second appeal has been preferred by the defendants against the judgment and decree dated 14.12.2010 passed by the learned Principal District Judge, Chengalpattu in A.S.No.12 of 2010 confirming the



judgment and decree passed by the Sub Court, Tambaram in O.S.No.31 of 2008 dated 24.11.2009 .

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2. For the sake of convenience, the parties are indicated herein as per their litigative status and ranking before the Trial Court.

3.1. According to the plaintiff, the plaintiff and the defendants No.1 to 3 are the members of Hindu Coparcenary, owning and possessing the suit "A" and "B" schedule properties. The plaintiff is the wife of late Ponnusamy and defendants Nos.1 to 3 are the sons and daughter of late Ponnusamy. Ponnusamy was working as a Foreman in Metropolitan Transport Corporation at Chrompet Depot, Chennai and he purchased 'A' and 'B' schedule properties from one S.R.Mothi under a Registered sale deed dated 27.06.1974 with his personal income and he was in possession and enjoyment of the same by constructing houses therein.

3.2. Ponnusamy's first wife viz., Dayalam who is the mother of the defendant Nos. 1 to 3 died on 06.11.1987. The late Ponnusamy married the plaintiff on 21.08.1989 at Vadapalani Murugan Temple. After their marriage, they lived together in the first floor of the premises which is described as 'B' Schedule property. The defendants No.1 and 2 were staying in the Ground Floor along with their family which is described as 'A' schedule property.

3.3 Ponnusamy executed a Power of Attorney Deed in favour of defendant Nos. 1 and 2 to look after the said property since the plaintiff's

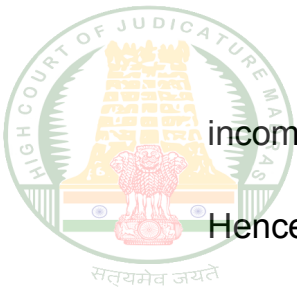


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husband Ponnusamy became sick. Thereafter, the defendants behaviour entirely changed and they were harassing the plaintiff and her husband and hence Ponnusamy cancelled the Power of Attorney deed on 05.09.1998. The defendants went to the extent of assaulting the plaintiff and her husband. They preferred a complaint before Selaiyur Police Station and after enquiry, Police warned the defendants No.1 and 2 not to resort to assault them. Thereafter, defendants No. 1 and 2 forcibly took away the original documents of the suit properties and Ponnusamy sent a legal notice on 16.04.1999 to the defendants No. 1 and 2 to return back the original documents pertaining to the suit properties.

3.4. While so, Ponnusamy voluntarily retired from service in the year 1994 due to his health condition. He spent the retirement benefits for the welfare of the defendants. The defendants have completely deserted the plaintiff and her husband and for their livelihood, they had let out a portion of premises in the first floor for a monthly rent of Rs.400/- and both of them managed to meet out their expenses by themselves.

3.5 Ponnusamy died on 13.05.1999. After the demise of Ponnusamy, the defendants' started to harass the plaintiff. The defendants 1 and 2 were attempting to chase away the plaintiff from the suit properties in order to occupy the entire property and she was threatened by the defendants to vacate the property. The plaintiff has no other source of



income except the rental income and she has no other place to live.

Hence, the suit for partition of her 1/4th share in the suit properties and for permanent injunction not to alienate the suit properties.

4. The Trial Court framed appropriate issues. Apart from examining the plaintiff as P.W.1, she had also examined three witnesses and marked eleven(11) documents. On the defendants' side, the second defendant has examined himself as DW1 and one Aseervatham who is the maternal uncle of the defendants was examined as DW2. Ex.B1 is the sale deed executed by one Mothi in favour of Ponnusamy in respect of the suit properties. Ex.B2 is the Patta in the name of Ponnusamy and Ex.B10 dated 17.08.1989 is the certified copy of the Will executed by the deceased Ponnusamy in favour of the defendants herein. On hearing both sides and on the basis of the oral and documentary evidence, the Trial Court decreed the suit and granted 1/4th share in favour of plaintiff and also granted permanent injunction in respect of 'B' schedule property.

5. Aggrieved by the same, the defendants preferred appeal in A.S.No.12 of 2010 before the Principal District Court, Chengalpattu.

6. The First Appellate Court upon analysing the oral and documentary evidence, concluded that DW2 admitted the possession of



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the suit properties by the plaintiff. Since the Will Ex.B10 has not been proved and not probated before the proper forum, the defendants are not entitled to claim absolute ownership over the suit properties. The First Appellate Court went on to hold that the suit properties are the self acquired properties of Late Ponnusamy, the husband of the plaintiff and therefore, the plaintiff is entitled for 1/4th share in the suit properties. Accordingly, the appeal was dismissed by confirming the trial Court's findings. Challenging the concurrent findings of the Courts below, the defendants have filed this Second Appeal. The following substantial question of law arises for consideration :-

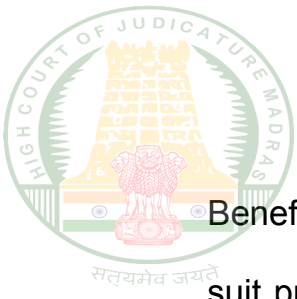
"(i) In a case where the will has been proved in accordance with the requirements of Section 68 of Indian Evidence Act read with Section 63 of Indian Succession Act and admittedly the said Will has been written in favour of the children of the first wife by the father, whether the Courts below were right in decreeing the suit filed by the plaintiff for partition by totally disregarding the existence of the Will?

(ii) Whether the Court below is right in complying the law of intestate succession and passed preliminary decree and allotting share to the plaintiff when it is settled law that the Will break the succession by intestacy?"



7. Learned counsel for the appellants/defendants submitted that

the plaintiff is not entitled for partition as per the conditions contained in the registered Will. Their father late Ponnusamy was employed as foreman in MTC and out of his own earnings, he purchased the suit properties on 27.06.1974 under a registered sale deed and put up construction to an extent of 700 sq.ft in the ground and first floor. Late Ponnusamy obtained patta for the suit properties on 03.05.1973. The defendants mother Dayalam died on 06.11.1987. Thereafter, Ponnusamy married the plaintiff/Sundari. Ponnusamy executed a registered Will on 17.08.1989 before marrying the plaintiff. He bequeathed the schedule mentioned properties in favour of the defendants and the original Will was with the father Ponnusamy. After the death of Ponnusamy, the original Will was retained by the plaintiff. While searching the papers, the defendants got the challan pertaining to the Will. The second defendant applied for the certified copy of the Will and he obtained the same and came to know about the contents of the Will. The properties have been described as “A”, “B” and “C” schedule in the said Will. “A” schedule property of the Will has been bequeathed to the first defendant and “B” schedule property has been bequeathed to the second defendant and “C” schedule property has been bequeathed to the third defendant. Ponnusamy died on 13.05.1999 and the Will came into effect on the death of Ponnusamy.



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8. The defendants received the documents from the Aminjikarai Benefits Fund where the properties were mortgaged. The plaintiff left the suit property voluntarily and she is not in possession of the property. Now the entire property is under the control of the defendants. Ponnusamy had mortgaged the property with Aminjikarai Benefit Fund Ltd, Chrompet Branch on 11.11.1994 and second mortgage was also created on 07.09.1995 with the said Benefit Fund. Since Ponnusamy was not able to repay the said loan, defendants 1 and 2 were asked to repay the said mortgage loan and they obtained the original documents after discharging the loan.

9. Learned counsel for the defendant further contended that the Will Ex.B10 was executed long before the death of the Testator and no malafides can be attributed against Testator. Attestor to the Will has been examined to prove the Will. Both the Courts have held that the attestor is a interested witness, which is incorrect; only the beneficiary under the Will should not sign as attesting witness; there is no bar under law that the relative should not sign as attesting witness. He further submitted that PW.2 has stated that the Testator signed the Will with good health and sound state of mind. PW2 also deposed that the Testator signed in the Will in the presence of the attestor. Therefore, the Will has been duly proved. No subsequent Will was executed by the deceased Ponnusamy.



He further argued that the Will was executed 5 days before the second marriage of Ponnusamy. Ex.B10 and B11 letters were prepared for the purpose of this case. There is no mention about the Will in Ex.P5 letter of late Ponnusamy. Though the Will was executed under compulsion, in Ex.B5 letter, the deceased Ponnusamy has acknowledged about the execution of B.10 Will. Hence, the plaintiff is not entitled for any share in the suit properties.

10. Per contra, the learned counsel for the plaintiff would vehemently argue that the Will is executed in suspicious circumstances; the original Will is not produced by the defendants and D.W.2 is an interested witness. The Trial Court as well as the First Appellate Court did not conclude that Ex.B10 Will is a valid document. The plaintiff married the deceased Ponnusamy after the death of his first Wife Dayalam. He would further contend that the suit properties are the self acquired property of Ponnusamy and as her husband died intestate, plaintiff is entitled for 1/4th share in the suit properties.

11. It is evidence of PW.1/plaintiff that the plaintiff and late Ponnusamy got married after the death of his first wife Dayalammal. The defendants 1 to 3 are the sons and daughter of deceased Ponnusamy



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born through his first wife Dayalammal and the suit property namely 2 storied building measuring about 700 sq.ft situate in vacant area of 2440 sq.ft in S.No.120/1A1 with poromboke land measuring 1200 sq.ft totally 3640 sq.ft at No.161, Sembakkam Village, Tambaram Taluk, Kancheepuram District bounded on North by Gangai Amman Koil Street, on South by House No.1/1, East by House of Dayalan and West by Main Street. It is also not in dispute that the suit properties (first floor and second floor) viz., Schedule 'A' and Schedule 'B' were purchased by the deceased Ponnusamy from one S.R.Mothi on 27.06.1974 through the registered sale deed. PW1 would state that 1st and 2nd defendants attempted to chase her away from the property and threatened to go out of the property. Hence, she filed the suit for partition.

12. The prime contention of the defendant Nos.1 to 3 is that their father late Ponnusamy executed a registered Will on 17.08.1989 in respect of the suit properties and the Will was executed before their father's second marriage. The original Will was with the father of the defendants. When they searched for the original Will, they got only the connected challan and with the help of said challan, certified copy of the Will was obtained and it was filed before the Court below. As per the Will, no property was allotted to the plaintiff. After the death of Testator, the Will



came into force and as per the Will, three schedules namely A,B and C have been mentioned in the Will and 'A' schedule is allotted to 1st defendant and 'B' schedule is allotted to 2nd defendant and 'C' schedule is allotted to the 3rd defendant as per the Will.

13. In respect of the execution of Will, one of the attester to the Will namely DW2 has been examined and he has clearly deposed about the execution of Will. But the Trial Court as well as the First Appellate Court have not properly appreciated the evidence of DW2 and rejected the case of the defendants which is totally incorrect.

14. The suit property is two storied house situate at Sembakkam as per Ex.B1 sale deed. The suit property is purchased by the deceased Ponnusamy on 27.05.1974. The plaintiff has laid the suit for partition on the ground that the deceased Ponnusamy died intestate, whereas, the defendants would contend that his father executed a Will in their favour and therefore, the Will breaks the line of succession. As per Section 101 of Evidence Act, one who pleads have to prove the Will. Therefore, onus lies on the defendants that the Will was executed by late Ponnusamy with the fit state of mind. Law is well settled that the Will has to be proved as per Section 63 of the Indian Succession Act and Section 68 of the Indian



Evidence Act. As the property is self acquired property of the defendant's father Ponnusamy, the father of the defendants has got right to execute the Will.

15. As per Section 63 of Indian Succession Act, 1925, Will is required to be in writing signed by the Testator and attested by atleast 2 witnesses. Before the Hindu Wills Act, 1870, no Hindu Will was required to be in writing, the Will can be oral or in writing. If the Will was in writing, it did not require to be signed or attested. By the Indian Succession Act, 1925, all Wills are required to be in writing and the effect is that every Hindu Will must be in writing, signed by the Testator, and attested by at least two witnesses, as contemplated under Section 63 of the Indian Succession Act, 1925.

16. The Law is well settled as regards the Will, that it is the predominant duty of the Court to ascertain from the language of the Testator, what was his intention while executing the Will. It is true that it has to be borne in mind other matters, than merely the words used and the surrounding circumstances, the portion of the Testator probably that the Testator was used words in a particular sense and many more things have to be looked into. The Court has to put itself into the Testator's arm chair.



17. One of the attessor to Ex.B10 Will was examined as DVvz

Thiru. Asirvatham. It is the evidence of DW2 that he is the maternal uncle of the defendants and the brother of deceased first wife of Ponnusamy.

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18. D.W.2 has stated as follows:

" என்னிடம் காட்டப்படும் உயில் உள்ள கையெழுத்து என்னுடையதுதான். பொன்னுசாமி என் அக்காவின் கணவர் . பொன்னுசாமி C றந்துவிட்டார் தற்போது உயிரோடு இல்லை. அவர் எழுதிவைத்த உயில்தான் என்னிடம் காட்டப்பட்டது நாம் கையெழுத்து போட்டுள்ளேன். பி .வா.தசா.10 ஆக குறியீடு செய்யப்பட்டுள்ளது. என்னுடன் மணி என்பவரும் சேர்ந்து சாட்சி கையெழுத்து போட்டுள்ளார் . பொன்னுசாமி உயில் எழுதிவைத்தபோது நானும் இருந்தேன். பொன்னுசாமியின் கையெழுத்து உயிலில் உள்ளது அவரது மகன் தமிழரசன் மற்றும் வெற்றிவேலுக்கு உயில் எழுதி வைத்தார் . பொன்னுசாமி முதலில் கையெழுத்து போட்டார் . அதன்பிறகு நான் போட்டேன். உயில் எழுதிய போது என் அக்கா இறந்துவிட்டார். உயில் எழுதும் போது 2 ம் திருமணம் செய்துக் கொள்ளவில்லை அதன்பிறகுதான் வாதியை திருமணம் செய்தார் வழக்கு சொத்து சம்பாதிப்பு சொத்தாகும். திருமணத்திற்கு 10 நாட்கள் முன்பாகதான் அவர் உயில் எழுதி வைத்தார் .

19. It is relevant to refer to the observations made by the Hon'ble Supreme Court in the case of **Abdul Jabbar V. Venkata Sastri reported in 1969 AIR 1147**, wherein it was held that the act of attestation must be done with *animo attestandi* i.e., with the intention to attest; the fact that one's name is on the document does not make him an attesting witness, irrespective of the purpose for which it is there. There is no requirement of law that the attesting witness should be knowing the content of the will. The only requirement is that the testator of the Will should put his signature or



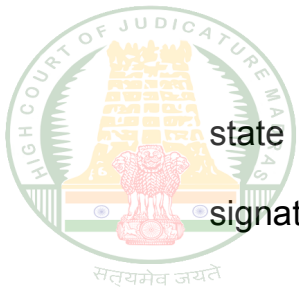
thumb mark as the case may be in the presence of two or more witnesses and that the said witnesses also should put their signature in the presence of the testator as it was done in the instant case.

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20. Ultimately it has to be proved that the attesting witness saw the Testator signing the Will. The personal acknowledgement of his signature and that each of the witness signed the Will in the presence of the Testator. In this case, one attesting witness in Ex.B10 has been examined as DW2. His evidence is with regard to the attestation as mentioned supra.

21. From the careful perusal of evidence of D.W.2, it is not interferable that he saw the Testator signing the Will and he attested in the Will in the presence of Testator. In stricto sensu, it cannot be construed that by relying upon the testimony of DW2, the Will has been duly proved in accordance with law. Therefore, the burden cast upon the defendants under Section 68 of Indian Evidence Act is not properly discharged.

22. Further more, the preponderance of evidence must satisfactorily establish that the Will was signed by the Testator that the Will was signed by Testator. Testator at the relevant time was in a sound and disposing

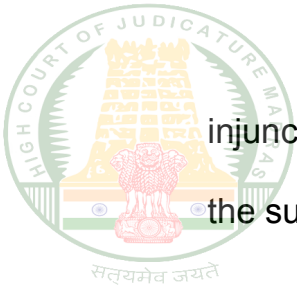


state of mind, that he understood the nature and effect of affixing his signature to the document on his own desire.

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23. It is the evidence of DW1 Vetrivel that it is his father Ponnusamy executed a registered Will on 17.08.1989 before marrying the plaintiff. The Will was executed out of his free and disposing state of mind. It is his further evidence that after death of Ponnusamy on 13.05.1995, the Will came into effect. DW2 Asirvatham has not deposed that the Testator signed in his presence and his attestation was after signing by the Testator.

24. This Court is of the considered view that Section 68 of the Indian Evidence Act is not duly complied with and Ex.B10 Will is not proved in accordance with law. Hence, the defendants are not entitled to claim the suit property based on the Will. The deceased Ponnusamy died on 13.05.1999 leaving behind his legal heirs, his second wife/ plaintiff herein and his two sons and a daughter who born through his first wife. As the suit properties are the self acquired properties of the deceased Ponnusamy, the plaintiff is entitled for 1/4th share in the suit properties. The Trial Court has rightly passed preliminary decree for partition granting 1/4th share in the suit property in favour of the plaintiff. As regards grant of permanent injunction, settled principles of law is that no co-owner can seek permanent



injunction against the other co-owner and all the legal heirs have right over the suit property. Therefore, plaintiff is not entitled for permanent injunction.

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25. In the result, this Second appeal is partly allowed and the preliminary decree granting 1/4th share in the suit property in favour of the plaintiff is confirmed and the plaintiff is not entitled for relief of permanent injunction. The Trial court has granted permanent injunction in favour of the plaintiff in respect of the B schedule property and therefore, said finding of permanent injunction is interfered with and stands set aside.

27-02-2025

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Index:Yes/No
Internet:Yes/No
Speaking order: Non-speaking order



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