



A.S.No.181 of 2022

THE HIGH COURT OF JUDICATURE AT MADRAS

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Date :18.02.2025

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

A.S.No.181 of 2022

1. K.Ebrahim
2. Agrihim

... Appellants

Versus

1. K.Prabudoss
2. K.Sugumari
3. Krupavaram
4. Elizabeth Rani
5. Talitha
6. P.Vijayakumar
7. P.Premkumar

... Respondents

PRAYER : This Appeal Suit has been filed under section 96 of Code of Civil Procedure to set aside the judgment and decree of the IV Additional District Court, Thiruvallur @ Ponneri in O.S.No.49 of 2014 dated 15.12.2020 in respect of dismissal of suit with regard to item No.1 and 2 of the plaint schedule property by decaring Ex.A.2 [B2] and B.3 as null and void and by



A.S.No.181 of 2022

granting permanent injunction in favour of the plaintiffs by allowing t his
appeal.

For Appellants : Mrs.C.Uma

For Respondents : Mr.D.Nellaiappan – R1, R5, R6 and R7

No appearance – R2, R3 & R4

JUDGMENT

Challenging the dismissal of the suit in respect of Item Nos.1 and 2 of the suit properties, the present appeal has been filed.

2. The parties are arrayed as per their own ranking before the trial Court.

3. The plaintiffs and the defendants are sons and daughters of one V.Kottaiah and K.Asirvathamal. According to the plaintiffs, the property has been purchased by their father on 04.05.1983 by utilizing 30 sovereigns of



A.S.No.181 of 2022

WEB COPY

gold jewels of their mother. According to the plaintiffs, the first defendant has two wives and he has exploited the rents derived from the suit properties.

Further, their father was suffering from physical and mental infirmities for many years. Hence, after his death, when the plaintiffs demanded partition, the defendants have not come forward for the same. Hence, the suit for partition and declaration that the Will and settlement deeds as null and void and cancellation of the above documents.

4. The first defendant filed the written statement, which is adopted by the defendants 5, 6 and 7. In the written statement, the first defendant admitting that the property has been purchased by their father Kottaiah, denied that 30 sovereigns of gold jewels of their mother was utilized for purchase of the property. Their father was working in Indian Tobacco Company since 1970. He raised money from his savings and contributed amount to the construction of house in the land. It is also denied that his father had physical and mental ailments. According to them, the plaintiffs are aware of the settlement deed executed in the year 2006 and the same has been questioned



A.S.No.181 of 2022

WEB COPY

after a lapse of more than five years. The father of the defendants has executed a Will and a settlement deed in respect of item Nos.1 and 2 of the suit properties. Hence, contended that the suit is barred by limitation.

5. In the additional written statement filed by the first defendant, it is his contention that as his father has already executed a Will and the properties have already been dealt with, no property in item No.2 is available for partition. Hence, prayed for dismissal of the suit.

6. The defendants 2 to 4 have been set exparte in the suit.

7. On the basis of the above pleadings, the following issues have been framed for consideration in the suit :

1. Whether the plaintiffs are entitled for the relief of partition of suit schedule properties?



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A.S.No.181 of 2022

2. Whether the plaintiffs can get the relief of declaration in respect of registered settlement deed dated 02.06.2006 as null and void against the defendants?

3. Is it correct to say that plaintiffs can get 1/6th share each in item 3, 4 suit property alone?

4. Whether the suit is barred by limitation?

5. Whether the plaintiffs are entitled to the relief of permanent injunction in respect of suit properties against defendants 1, 5 to 7?

6. Whether the Settlement dated 02.06.2006 was obtained by first defendant from his father under suspicious circumstances?

7. To what relief?

Additional Issue No.1

Whether the registered Will dated 02.06.2006 said to have been executed by the plaintiff's father and the first



A.S..No.181 of 2022

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defendant in favour of the second defendant is null and void
and not binding on the plaintiffs?

8. On the side of the plaintiffs P.W.1 to P.W.4 have been examined and Ex.A.1 to Ex.A.22 have been marked. On the side of the defendants, D.W.1 to D.W.3 have been examined and Ex.B.1 to Ex.B.3 have been marked. The trial Court relying upon the original Will and the settlement deed which are marked as Ex.B.2 and B.3, dismissed the suit in respect of Item Nos.1 and 2 of the suit schedule properties. Challenging the same, the present appeal has been filed.

9. The learned counsel appearing for the appellants admitting that the properties have been purchased by their father, it is his contention that the Will and settlement deed in respect of item Nos.1 and 2 of the suit schedule properties, the trial Court accepted that both the Settlement Deed Ex.B.2 and Will Ex.B.3 without any proof. The very execution and attestation of the Will and Settlement Deed has not been established as required under law.



A.S.No.181 of 2022

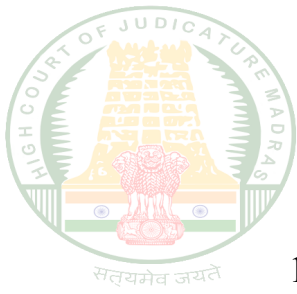
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Therefore, the trial Court dismissing the suit in respect of the above suit properties is not valid in the eye of law.

10. Whereas, it is the contention of the learned counsel appearing for the respondents that D.W.2 has been examined to prove the Will as per law and he has clearly spoken about the execution as well as attestation. It is his further contention that as far as the settlement deed is concerned, since it is a registered document, which is not denied, there is no need to examine the attesting witness as per Section 68 of the Indian Evidence Act.

11. In the light of the above submissions, now the point that arises for consideration is :

Whether the defendants have proved the settlement deed Ex.B.2 and Will Ex.B.3 dated 02.06.2006 as required under law?



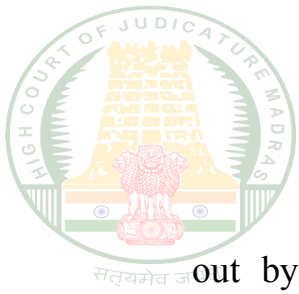
A.S.No.181 of 2022

12. Point :

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The relationship of the parties is not in dispute. The crux of the issue is with regard to the document projected by the first defendant, who is none other the brother of the plaintiffs. According to the first defendant, his father has executed a registered Will Ex.B.3 dated 02.06.2006 and also Ex.B.2 settlement deed in his favour in respect of the properties in Item Nos.1 and 2 in the suit schedule properties. Whereas, the plaintiffs in their pleadings pleaded to the effect that the father was not in sound mental capacity and he was suffering from physical infirmities for many years. Besides he also suffered brain ailments and treated in the hospital. Whereas, such facts have been disputed by the defendant. Be that as it may.

13. Once a person propounds a Will, the burden lies on him to establish the document in the manner known to law. The entire pleading of the plaintiff makes it clear that only when they demanded for partition, the defendants informed about the Will and the settlement deed. Whereas, the pleading of the plaintiffs clearly indicates that Will and the settlement deed have been brought

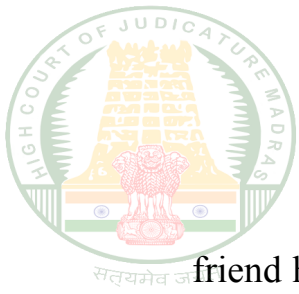


A.S..No.181 of 2022

WEB COPY

out by way of fabrication and collusion. Therefore, once the Will and Settlement Deed has been denied, the burden lies on the person to prove execution as well as attestation of both the documents as required under section 68 of the Indian Evidence Act.

14. The defendants relied upon the evidence of D.W.2 to prove the attestation as well as execution of the document. It is relevant to note that D.W.2 is one of the attesting witness in both the documents said to have been executed on 02.06.2006 and registered on the same day. The chief examination of D.W.2 indicates that while he was standing in a tea shop, he was called by one of his friend to sign in certain documents as a witness. Therefore, he went to the registrar's office and signed in the documents as a witness, as per the proof affidavit filed by D.W.2. His cross examination when scanned, makes it clear that the very attestation and execution has not been established. His evidence clearly indicates that he always used to be in the tea shop and whenever, some known person asks him to sign as a witness, he will sign in the document. Accordingly, on the relevant date, one of his

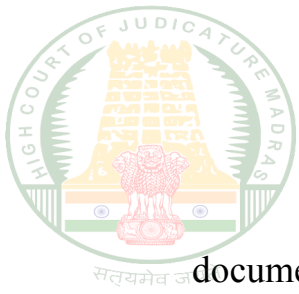


A.S.No.181 of 2022

WEB COPY

friend had asked him to sign as a witness in a document and hence, he went to the Registrar's Office and signed. His entire cross examination makes it clear that he is not aware of the persons who signed the documents. Further in his cross examination he has clearly admitted that he has also come to give evidence in another Will case in the District Munsif Court, Ponneri. His very evidence indicate that his main avocation itself is to sign the document whenever called by any person. His entire cross examination proves the fact that he is not aware as to who has prepared the document and who has signed the document. Adding to that, he has also admitted in categorical terms that he is not aware of the facts narrated in the proof affidavit. These facts clearly establish the fact that he is only a name lender, who has been called upon to sign the documents.

15. Attestation means, not only signing a document, the witness has to prove that the testator has signed the document in his presence and the testator has also seen both the witnesses affixing their signature in the document and both the witnesses have also seen the testator affixing his signature in the



A.S.No.181 of 2022

WEB COPY

document. None of the above ingredients have been satisfied to prove the attestation of the Will as required under section 63 [c] of Indian Evidence Act.

Though the settlement deed has also been registered on the same day, when there is categorical denial and the settlement deed was attacked on the basis of fraud, fabrication and collusion, it is incumbent on the part of the person to prove the document by examining attesting witnesses. In such view of the matter, this Court is of the view that the trial Court dismissing the suit in respect of the item Nos.1 and 2 on the basis of the Will and Settlement deed cannot be sustained in the eye of law. The points are answered accordingly.

16. In the result, this Appeal Suit is allowed and the judgment and decree of the trial Court dismissing the suit in respect of Item Nos.1 and 2 of the suit properties is set aside and a preliminary decree is passed in respect of Item Nos.1 and 2 of the suit properties declaring that the each of the plaintiffs are entitled to 1/6th share in the above properties. Similarly, the defendants are also entitled to 1/6th share in the above properties. There shall be no Order as to costs.



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A.S.No.181 of 2022

18.02.2025

Index : Yes / No

Internet: Yes

Speaking/non speaking order

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To,

The IV Additional District Judge,
Thiruvallur @ Ponneri.



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A.S.No.181 of 2022

N. SATHISH KUMAR, J.

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A.S.No.181 of 2022

18.02.2025