

M. Radhamani Vs. Gomathiammal and Others

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Court : Chennai Madurai

Decided On : Sep-21-2016

Judge : S.S. Sundar

Appeal No. : Second Appeal (MD) No. 373 of 2004 & M.P.(MD)No. 1 of 2010 & 1 & 2 of 2014

Appellant : M. Radhamani

Respondent : Gomathiammal and Others

Judgement :

(Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.No.29 of 2003 on the file of the Sub Court, Sankarankovil, dated 16.12.2003 confirming the judgment and decree passed in O.S.No. 131 of 2000 on the file of the District Munsif Court, Sankarankovil, dated 24.02.2003.)

1. This second appeal has been filed by the first defendant in the suit as against the judgment and decree of the lower appellate Court in A.S.No.29 of 2003 on the file of Sub Court, Sankarankovil, confirming the judgment and decree of trial Court in O.S.No.131 of 2000 on the file of the Principal District Court, Sankarankovil.

2. The third respondent in this appeal filed a suit in O.S.No.131 of 2000 on the file of the Principal District Munsif Court, Sankarankovil, for partition and for separate possession of 1/4th share in the suit properties and for mesne profit.

3. The suit properties are described in the plaint in four items. Items 1 and 2 are house properties. Third item is a land measuring an extent of 1.78 acres in Survey No.484 in South Sankarankovil Village along with a rice mill, floor mill and electrical machineries. Item 4 is a land measuring an extent of 1.22.00 hectares comprised in two Survey numbers in Sankarankovil village along an agricultural electricity service connection.

4. The case of the plaintiff / third respondent herein is that the suit properties belong to her father Muthiah Chettiar and her mother Gomathi Ammal and that the properties are their selfacquisition. After the death of Muthiah Chettiar in or about 1985 and her mother in the year 1997, the suit properties devolved on the plaintiff / third respondent and defendants 1 to 3 who are her brother and sisters respectively. It was a further case that her father and mother died intestate and that she is entitled to 1/4th share in all the suit properties.

5. The suit was contested by the appellant who is the first defendant in the suit. With regard to the suit first item, it was the case of appellant that it was purchased by Gomathi Ammal, the mother of the plaintiff and defendants and that she executed a gift deed dated 11.11.1991 in favour of her grand sons namely the two sons of appellant / first defendant. Hence, it was further contended by the appellant that the plaintiff / third respondent is not entitled to any share in item 1 of the suit property and that the suit is not maintainable without impleading his two sons who are in enjoyment of the suit property as per the gift deed. With regard to the second item and fourth item of the suit properties, the first defendant contested the suit on the ground that they belonged to his father Muthiah Chettiar and that he had executed a Will dated 17.12.1984, in favour of the appellant / first defendant. Since the appellant is in exclusive possession as a legatee under the Will, the appellant disputed the right of plaintiff to seek partition. With regard to third item of the suit property, the appellant contended that this item was conveyed to the first defendant by the father even in the year 1973 orally and that the appellant / first defendant is in enjoyment of the same by effecting mutation in the revenue records in his name and by installing rice mill and floor mill in his name. With regard to the fourth item in the suit property, it was also the case of the appellant / first defendant that the said property was mortgaged by Muthiah Chettiar, the

father of the appellant, in the year 1982 and that the appellant / first defendant paid the mortgage money and redeemed the mortgage in the year 1989. According to the appellant / first defendant, item 4 is also covered by the Will under Ex.B7. It is also the case of appellant / first defendant that item four is in his exclusive possession.

6. The trial Court, after framing necessary issues, dismissed the suit in respect of Item No.1 holding that the settlement deed executed by Gomathi Ammal in favour of the sons of appellant / first defendant is valid and acted upon. With reference to Items 2 to 4, the trial Court found that they are available for partition and the plaintiff / third respondent is entitled to 1/4th share in all the items. However, the Trial Court after finding that the appellant / first defendant has installed a rice mill in the third item, held that the appellant / first defendant is entitled to allotment of the third item in equity and that the allotment of properties should be made without taking into account the value of the rice mill and floor mill. It is relevant to note that the Trial Court specifically rendered a finding that the Will propounded by the appellant / first defendant was not proved by the appellant after pointing out several discrepancies in the evidence and that several documents and circumstances are against the probability about the existence of the Will under Ex.B7.

7. The appellant / first defendant filed an appeal in A.S.No.29 of 2003 as against the judgment and decree of the Trial Court. The plaintiff / third respondent also filed a Cross Objection challenging the judgment and decree in respect of items 1 and 3 of the suit schedule. The appellate Court dismissed A.S.No.29 of 2003 and partly allowed the Cross Objection by modifying the decree to the effect that the appellant / first defendant is entitled to allotment of only the portion of the land in which the rice mill and floor mill are constructed and that the plaintiff / third respondent is entitled to 1/4th share in respect of the remaining lands in the third item of the suit schedule. Aggrieved by the judgment of the lower Appellate Court, the first defendant has filed the above Second Appeal.

8. The learned Counsel for the appellant / first defendant submitted that he has filed two interlocutory applications in I.A.No.141 of 2003 and I.A.No.155 of 2003

for reception of additional documents before the Appellate Court and that the said additional documents are very much relevant for the disposal of the above appeal. The learned counsel also submitted that the lower Appellate Court though rejected the applications, at the time of hearing the appeal, the first appellant is not able to trace the documents filed along with the said applications.

9. The learned Counsel for the appellant / first defendant further submitted that the execution of the Will under Ex.B7 is genuine and that the Courts below have not considered the oral evidence of D.W.2 and other circumstances which are in favour of the genuineness of the Will. Since the properties are held to be the properties of the father of appellant / first defendant, namely Muthiah Chettiar, the learned counsel for the appellant submitted that the Courts below ought to have upheld the truth and genuineness of the Will and that the plaintiff / third respondent is not entitled to any share in the properties.

10. Heard the learned counsel for the appellant and the learned counsel for the respondents and the judgments of the Courts below are perused.

11. At the time of admitting the appeal the following substantial questions of law have been framed by this Court:

(1) Whether the trial Court and the first appellate Court are correct in holding that the appellant / first defendant failed to discharge the burden of proving the execution of the Will Ex.B7 as per Section 68 of the Indian Evidence Act, 1872?

(2) Whether the Courts below are correct in holding that the executant of the Will Ex.B.7 had no power of disposition of the properties bequeathed thereunder?

12. Sum and substance, the entire argument of the learned counsel for the appellant revolves on establishing the truth and genuineness of the Will alleged to have been executed by the father of the appellant / first defendant under Ex.B7. The learned Counsel for the appellant / first defendant also relied upon the documents which are in the nature of revenue records to show that the appellant / first defendant is in enjoyment of the suit properties as an absolute owner.

13. It is to be noted that the appellate Court framed a specific issue whether the suit properties item 2 and 4 belong to the appellant by virtue of the Will under Ex.B7 and whether the appellant / first defendant is entitled to item 2 and 4 of suit scheduled properties by adverse possession. The appellate Court has elaborately considered the genuineness of the Will under Ex.B7. It is well settled that the burden of proof of Will lies heavily on the person who propound the Will. Every suspicious circumstances has to be explained by the propounder of the Will. In the present case, the Will under Ex.B7 was executed on 01.06.1984. The testator namely the father of the appellant / first defendant who executed the Will died on 17.12.1984. After considering the evidence of D.W.2 one of the attestors of the Will, the appellate Court found that D.W.2 is a person who is also a rice merchant and a business associate of the appellant / first defendant. Since the witness D.W.2 was not able to identify the signature of the attestor of the Will under Ex.B7, the appellate Court did not accept the evidence to prove the due execution of the Will. Though a Birth Certificate under Ex.B25 was produced for the purpose of showing that the other attestor of the Will one Rama Lakshmanan died on 20.12.2001, the appellate Court found that the said Rama Lakshmanan is not an attestor of the Will under Ex.B7. Hence, the document under Ex.B25 was rejected as irrelevant.

14. The lower appellate Court also referred to the written statement filed by the appellant/first defendant in another suit in O.S.No.275 of 1993 on the file of the District Munsif Court, Sankarankovil, which was filed by the second respondent herein and the mother of the appellant / first defendant against the appellant / first defendant and one Bothaiyan. This written statement is marked as Ex.A4. The appellate Court found that there is no reference to the Will under Ex.B7 in the written statement filed by the appellant in the previous suit and that the appellant contended in the written statement that the properties of Muthiah Chettiar are joint family properties and that there was an oral partition between the appellant and his father Muthiah Chettiar whereby the appellant / first defendant was put in enjoyment of all the properties. He also pleaded ouster. In the said circumstances, the appellate Court disbelieved the existence of the Will at the time when the written statement was filed by the appellant in the previous suit.

15. Having regard to the specific findings of the lower appellate Court on the question of proof of Will after an elaborate consideration of all material circumstances, I find that the judgment of the appellate Court is perfectly valid. During the course of arguments, this Court, on comparison of the signature of Muthiah Chettiar found in the Will Ex.B7 with the admitted signatures of Muthiah Chettiar in other documents, find that the signature of the testator, namely, Muthiah Chettiar in Ex.B7 is not similar to the admitted signatures of the Muthiah Chettiar. It is also a fact that the Will under Ex.B7 is unnatural as there is no reason or explanation for denying any share to the other legal heirs of the testator namely the father of the appellant.

16. Considering the concurrent findings of the Courts below and other material circumstances, I am of the view that the Will under Ex.B7 is not proved in accordance with law. The learned counsel for the appellant is not able to point out any infirmity in the findings of the Courts below on the question of genuineness of the Will. Strangely, the learned counsel for the appellant / first defendant submitted that the additional documents filed before the appellate Court would support his case on the genuineness of the Will and that the judgment of the lower appellate Court is vitiated for rejecting the applications. Despite sufficient time available to the appellant / first defendant to produce the document before this Court to consider the relevancy of those additional documents to prove the execution of the Will, the learned counsel for the appellant / first defendant expressed his inability by stating that his client is not able to trace those additional documents. Such an explanation cannot be accepted at this stage. Since the questions of law formulated by this Court at the time of admission are only factual and from the findings of the Courts below and the evidence, this Court answers the question of law against the appellant / first defendant by concluding that the Courts below are right in holding that the appellant / first defendant failed to discharge the burden of proving due execution of the Will under Ex.B7 in accordance with law. Since the Courts below have not given any finding on the power of disposition of the testator, the second question of law does not arise for consideration.

17. Having regard to the discussions in the previous paragraphs, I am of the view that the judgment and decree of the lower appellate Court passed in A.S.No.29 of

2003, dated 16.12.2013 are perfectly valid and do not suffer from any infirmity. Hence, this Second Appeal is devoid of any merit and hence, dismissed. Taking into consideration that the parties are close relatives, there is no order as to costs. Consequently, the connected miscellaneous petitions are closed.

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