

K. Murugan Vs. K. Mariappan and Others

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Court : Chennai Madurai

Decided On : Mar-03-2016

Judge : C.S. Karnan

Appeal No. : S.A.(MD).Nos. 358 & 359 of 2015 & M.P.(MD)Nos. 3 & 4 of 2015 & CMP(MD)No. 4 of 2016

Appellant : K. Murugan

Respondent : K. Mariappan and Others

Judgement :

(Prayers in S.A.(MD)No.358 of 2015: The Second Appeals filed under Section 100 C.P.C., against the judgment and decree dated 27.04.2015 made in A.S.No.16 of 2014 on the file of the Principal District Judge, Theni in reversing the Judgment and Decree dated 18.02.2014 passed in O.S.No.120 of 2011 on the file of Sub Court, Theni.)

Common Judgment

1. Both the second appeals arising out of Common Judgment made in A.S.Nos.16 of 2014 and 17 of 2014 made by the Principal District Judge, Theni. In both the appeals the appellant is same and the disputes involved in this case are one and the same, hence these two appeals are disposed by the Common Judgment.

2. In both the appeals the first defendant in the suit is the appellant herein and the plaintiff in the suit in O.S.No.120 of 2011 is the first respondent in the S.A.(MD)No.358 of 2015. The plaintiff in the O.S.No.148 of 2012 is the first respondent in the S.A.(MD) No.359 of 2015. The suit in O.S.No.120 of 2011 on the file of the Subordinate Judge, Theni was filed by first respondent in the S.A.(MD) No.358 of 2015 and the suit in O.S.No.148 of 2012 on the file of the Subordinate Judge, Theni was filed by the first respondent in S.A.(MD) No.359 of 2015. Both the suits were dismissed by the trial court. Hence, the Appeal in A.S.No.16 and 17 of 2014 was filed before the Principal District Court, Theni and the A.S.No.16 of 2014 was allowed and A.S.No.17 of 2014 was dismissed. The Appellant in both the appeals lost his case before the first appellate court, hence he filed these two Second Appeals.

3. The case of the appellant in these appeals are, the plaintiff in the suit are brothers, and sons of one V.Kaliappan of Bodinaickanur Village in Theni District. Dr.V.K.Marimuthu, the plaintiff in O.S.No.148 of 2012 is the oldest son of Mr.K.Mariappan, the plaintiff in O.S.No.120 of 2011 is the second son and Mr.K.Murugan, the first defendant in both the suits and appellant in these appeals is the last son of V.Kaliappan.

4. The defendants 3 to 7 in the suit in O.S.No.120 of 2011 are brothers and sisters and they are children of Kandasamy Gounder through his second wife. The said Kandasamy Gounder and the father of abovesaid Kaliappan are brothers. The above said Kandasamy Gounder had only son named Kalimuthu through his first wife. The defendants 2 to 4 in O.S.No. 148 of 2012 are tenants under the appellant herein in respect of item no.1 only and the defendants 6 to 10 are children of the above said Kandasamy Gounder through his second wife. Admittedly all these persons are originated from common ancestors.

5. The suit in O.S.No.120 of 2011 was filed by K.Mariappan with a prayer to declare the absolute title of the plaintiff over the properties mentioned in the schedule and also prayed permanent injunction against the defendants 1 and 3 to 7 and to pay the cost of the suit. The said suit was dismissed on 18.02.2014. Hence, he filed A.S.No.16 of 2014 before the Principal District Court, Theni and

the same was allowed and permanent injunction was also granted.

6. The suit in O.S.No.148 of 2012 was filed by Dr.V.K.Marimuthu with a prayer to declare the absolute title of the plaintiff over the item no.1 to 4 of the properties mentioned in the plaint and also prayed to surrender the vacant portion of the item no.1 and the first defendant to surrender the vacant portion of the item nos.2 to 4 in the plaint without any hindrance and further prayed half right of the plaintiff in item no.5 of the property mentioned in the plaint and also prayed the preliminary decree for partition and division of the said property into two equals and also prayed mesne profits. The said suit was dismissed on 18.02.2014. Hence, he filed A.S.No.17 of 2014 before the Principal District Court, Theni and the same was allowed in total vide order dated 27.04.2015.

7. The appellant in these appeal Mr.K.Murugan while filing these appeal under section 100 CPC the following common question of law arose and the same was admitted by this Court on 10.07.2015 and the question of law is as follows:1. Whether the lower appellate court has committed an error in law in not considering the suspicious circumstance surrounding Ex.A3-Unregistered Will by which the earlier registered Wills , dated 13.03.2005 and 25.05.2004 are said to have been revoked?

2. Whether the lower appellate Court has committed an error in law in rendering a finding that the authentication of Ex.A1 made by P.W.4 was in accordance with the provisions of the Notaries Act, 1952, despite the fact that the concerned register was not produced by him?

3. Whether the lower appellate Court has rendered a perverse finding upholding the validity of Ex.A3-Will which was allegedly executed at Bodinayackanoor and authenticated by a Notary Public from Usilampatti, whereas the two previous registered Wills dated 25.05.2004 and 13.03.2005 had been registered in the 1. Office of the Sub-Registrar functioning at Bodinayackanoor itself?

4. Whether the lower appellate Court committed an error in law resulting in miscarriage of justice by not considering the fact that the plaintiff in his petition under Ex.B3 had not referred to Ex.A3-Will?

8. This Court in its order dated 10.07.2015 made in M.P.(MD)No.1 of 2015 in S.A.(MD) No.358 of 2015 has dispensed the notice to the respondents 3 to 7 and also dispensed notice to the respondents 2 to 4 and 6 to 10 as per the order in M.P.(MD)No.1 of 2015 in S.A.(MD) No. 359 of 2015.

9. In both appeals the entire issue is revolving about the execution of an unregistered Will cancelling the two earlier registered Wills and distribution of properties as per the unregistered Will made by the testatrix. The other issues and facts of the case are not much relied by the either side counsel except for corroboration purpose. Since, the entire case is based upon the unregistered Will executed by the testatrix.

10. The appellant also raised the following factual disputes in these second appeals and seriously disputed the unregistered Will and also questioned the validity of the Will. In the cross examination also there were several questions in this nature. The appellant also questioned the cancellation of earlier Wills and execution of new Will in favour of brothers, which was marked as Ex.A3 before the trial court.

11. The appellant further doubted the circumstances in the execution and attestation of Ex.A3 and also doubted whether the propounder had proved the same before the lower appellate court. Further also questioned the non registration of the same.

12. The respondents in these appeals contended that the Will was executed in terms of Succession Act and Evidence Act and the circumstance under which the unregistered Will was executed was clearly explained and the attesting witnesses have clearly deposed and the advocate who wrote the Will was also examined before the trial court and there is no infirmities in the unregistered Will and the same was duly proved before the Court.

13. The learned counsels appearing on either side has elaborately argued the matter and they have also taken through the entire records and evidence in these appeals.

14. The first question of law is whether the lower appellate court has committed an error in law in not considering the suspicious circumstance surrounding Ex.A3- Unregistered Will by which the earlier registered Wills , dated 13.03.2005 and 25.05.2004 are said to have been revoked? The respondent s counsel argued that in the Succession Act and also in the Evidence Act there is no statutory bar prohibiting cancelling the registered Will through the unregistered Will. Further, he has also relied the Judgment reported in 2009 (3) SCC 687, wherein it was held that the execution must be proved by the propounder. In the instant case, the witnesses and advocate who wrote the same have clearly deposed the execution and fit state of mind of the testatrix, hence there is no suspicious circumstance arose in Ex.A3. By accepting the arguments, the question of law answered against the appellant.

15. With regard to the second question of law, the Ex.A1 made by PW4 was in accordance with the provisions of Notaries Act, without the production of the register. The learned respondents counsel has clearly argued that the notary public has deposed before the trial court that the register has been lost and he has made complaints to this effect and also along with register, the notary has lost his daughter s certificates. He has received duplicate certificates in respect of his daughter s qualification. This would show that the register has been actually lost. Hence, the production of the same is not possible. Further he has also argued that it is not mandatory to write a Will with the help of the notary. Only attesting witnesses and circumstance, fit state of mind have to be seen. In this case, all the circumstances are in favour of the respondents herein. Hence, this court comes to the conclusion that the second question of law is also fails.

16. The third question of law which revolves around is the place of execution of the Ex.A3 and also non registration of the same is also disputed, when the two previous Wills had been registered. The act or rules does not specify registration of Wills. Hence, the non registration cannot be questioned. It is the wish of the testator to choose the place and for simple reason, the unregistered Will has been executed in some other place the same cannot be questioned. As said earlier, the circumstance and genuineness of the witnesses and fit state of mind alone will prove the Will. Hence, this question of law also fails.

17. With regard to the last question of law is whether the omission of Ex.B3 not referred in Ex.A3 where in favour of the appellant. The testatrix is the person to decide the contents of the Will. The testatrix has given reasons as to why he has written an unregistered Will and the reasons for cancelling the earlier registered Wills. The testatrix case was clearly corroborated by the witnesses. Hence, the question of law is answered against to the appellant.

18. Therefore, all the substantial question of law that has been formulated in the memorandum grounds of appeals is answered against the appellants. Further, the lower appellate court has considered all the aspects in detail and there is no interference called for.

19. In the result, the Second Appeals fail and accordingly, the same are dismissed and the common decree and judgment passed by the First Appellate Court in A.S.No. 16 of 2014 and A.S.No. 17 of 2014 dated 27.04.2015 in reversing the Judgment and decree dated 18.02.2014 passed in O.S.No.148 of 2012 and O.S.No.120 of 2011 of the trial Court is hereby confirmed. There shall be no order as to cost. Consequently, connected miscellaneous petitions are closed.

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