
(2011) 08 MAD CK 0346

In the Madras High Court

Case No : S.A. No. 978 of 2011 and M.P. No. 1 of 2011

K.M. Ramasamy

APPELLANT

Vs

Thangavel, Meenakshi and Pavounal

RESPONDENT

Date of Decision : 25-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Evidence Act, 1872 — Section 68

Citation : (2011) 08 MAD CK 0346

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : P. Sarvana Sowmiyan, for the Appellant;

Final Decision : Dismissed

Judgement

R.S. Ramanathan, J.—The 1st Defendant in O.S. No. 106 of 2004 and the Plaintiff in O.S. No. 115 of 2004 on the file of the District Munsif Court, Gobichettipalayam, is the Appellant.

2. O.S. No. 106 of 2004 was filed by the 1st Respondent herein for declaration and injunction or in the alternative for partition and separate possession. The case of the 1st Respondent/ Plaintiff in that suit was that the suit property originally belonged to one Karuppamoopachi who was the paternal grandmother of the 1st Respondent and she died leaving behind her only son Kaliappa Nadar who was the father of the 1st Respondent and he was enjoying the property as her legal heir and Kaliappa Nadar had two daughters the Respondents 2 and 3 and a son the 1st Respondent and both daughters were given in marriage and two months prior to his death the Kalaiappa Nadar expressed his oral Will bequeathing the suit property to the 1st Respondent and due to the old age the said Kaliappa Nadar was not able to execute the Will in favour of the 1st Respondent and as per the oral Will the 1st Respondent is entitled to the suit property and if the oral Will is not believed, as the legal heir the 1st Respondent is entitled to 1/3rd share in the suit property and therefore he also prayed for

partition as alternative relief. In that suit the Appellant herein was the 1st Respondent/1st Defendant and he disputed the oral Will stated by the 1st Respondent and pleaded that Kaliappa Nadar while in sound disposing state of mind executed a registered Will dated 9.5.1991 bequeathing the suit property in his favour and therefore the Appellant became the absolute owner of the property and the Respondent has No. right or claim over the suit property. The Appellant is also in possession of the property and therefore the 1st Respondent is not entitled to the relief prayed for. The Appellant also raised the issue that the suit filed by the 1st Respondent is also barred as per Order 2, Rule 2 of Code of Civil Procedure,

3. In the suit filed by the Appellant in O.S. No. 115 of 2004 he prayed for declaration and injunction or in the alternative prayer of delivery of possession. The case of the Appellant in that suit was that the property was inherited by Kaliappa Nadar from his mother and he executed a registered Will dated 9.5.1991 while he was in sound disposing state of mind in favour of the Appellant and the Will was also upheld in C.R.P. No. 3563 of 1993 and therefore he is also entitled to the suit property under the Will.

4. The 1st Respondent contested the suit reiterating the allegations made in his plaint and also disputed the Will executed by his father in favour of the Appellant.

5. The trial Court tried both the cases together and delivered a common Judgment, dismissing the suit filed by the Appellant in O.S. No. 115 of 2004 and granted a decree of partition in O.S. No. 106 of 2004 filed by the 1st Respondent stating that the 1st Respondent is entitled to 1/3rd share in the suit property. The first appellate Court also confirmed the judgment and Decree passed by the trial Court and also dismissed the cross objection filed by the 1st Respondent. Hence, the two Second Appeals are filed.

6. The learned Counsel for the Appellant submitted that both the Courts erred in holding that the Will dated 9.5.1991 Ex.B3 was not proved, without appreciating the fact that the Appellant examined both the attesting witnesses to the Will and they also have given cogent evidence regarding the testamentary capacity of the testator and also the due execution of the Will by the testator and therefore submitted that when the Will was proved by examining the attesting witnesses and their evidence was cogent and convincing, the Courts ought to have held that the Will was proved and therefore both the Courts erred in dismissing his suit and granted a preliminary decree of partition in the suit filed by the 1st Respondent. He further submitted that the 1st Respondent initially filed O.S. No. 458 of 1991 for injunction and in that suit itself the Appellant filed written statement mentioning the Will executed by Kaliappa Nadar in his favour and in the injunction application the Will was proved and the matter was finally taken before this Hon"ble Court in C.R.P. No. 3563 of 1993 and this Court has also upheld the genuineness of the Will in the revision and thereafter O.S. No. 458 of 1991 was withdrawn by the 1st Respondent with liberty to file a fresh suit and even after that the suit was filed by him. The 1st Respondent has not denied the

Will in the plaint and therefore the 1st Respondent has also accepted the Will and this aspect was also not properly appreciated by the Courts below.

7. Considering the submissions made by the learned Counsel for the Appellant the following substantial questions of law are framed for consideration in these Second Appeals:

(1) Whether the Appellant had discharged the onus of proving the Will as contemplated u/s 68 of the Indian Evidence Act ?

(2) Whether the 1st Respondent is estopped under the law from questioning the genuineness of the Will which had been earlier decided as genuine by this Hon"ble Court in C.R.P. No. 3563 of 1993 ?

(3) Whether the claim of the 1st Respondent is barred under Order 2 Rule 2 of CPC as the claim was relinquished in O.S. No. 458 of 1991 ?

8. It is admitted that the suit property was inherited by Kaliappa Nadar from his mother and he was living with the 1st Respondent. It is also admitted that the Appellant is the son-in-law of Kaliappa Nadar and the 2nd Respondent herein is the wife of the Appellant. In the suit O.S. No. 458 of 1991 filed by the 1st Respondent he prayed for injunction against the Appellant herein. In that suit the Appellant filed a statement stating that the property was bequeathed to him by Kaliappa Nadar under a Will dated 9.5.1991 Ex.B3. That suit O.S. No. 458 of 1991 was filed only against the Appellant and the other legal heirs of Kaliappa Nadar namely the Respondents 2 and 3 were not impleaded as parties and issues were raised whether the suit is barred for non-joinder of necessary parties and whether the suit without a prayer for declaration of title is maintainable. Therefore, the 1st Respondent herein the Plaintiff in O.S. No. 458 of 1991 sought permission of the Court to withdraw the suit with liberty to file a fresh suit on the same cause of action and liberty was given to him and he was permitted to withdraw the suit. Therefore, the present O.S. No. 106 of 2004 was filed by the 1st Respondent for the relief stated above. As O.S. No. 458 of 1991 was allowed to be withdrawn with the permission of the Court and liberty was granted to the 1st Respondent to file a fresh suit, the present suit is not barred under Order 2 Rule 2 of Code of Civil Procedure., and therefore the substantial question of law No. 3 is answered against the Appellant.

9. In these two appeals the Appellant relied upon the Will Ex.B3 alleged to have been executed by Kaliappa Nadar. No. doubt he examined both the attesting witnesses to prove the execution of the Will and they have also given evidence regarding due execution of the Will. Nevertheless, the Courts below having regard to the admitted facts of the case and the evidence of the Appellant has rightly held that the Will could not have been executed by Kaliappa Nadar while he was in sound disposing state of mind and there are a suspicious circumstances surrounding the execution of the Will. As a matter of fact, the trial Court extracted the cross-examination of the Appellant and held that the Will could not have been executed by the testator. As seen from the cross-

examination, the Appellant was not living with the daughter of Kaliappa Nadar and he is living with another woman and he also admitted that as he neglected to maintain his wife, the daughter of Kaliappa Nadar and living with another woman his father-in-law Kaliappa Nadar developed hatred towards him. He further admitted that Kaliappa Nadar was not keeping good health during his last days and the Will was dated 9.5.1991 and he died on 5.7.1991. Further, the witnesses to the Will were examined by the 1st Respondent on his side and they have also deposed that at the time of execution of the Will the testator was not in sound disposing state of mind, though they gave evidence that the testator affixed his thumb impression in the Will as well as before the Sub Registrar. Considering the fact that the testator had developed hatred towards the Appellant as the Appellant neglected to maintain his wife, the daughter of the testator and living with another woman and in the Will No. reason was stated for disinheriting the legal heirs and the Will was executed when the testator was not in good health and the attesting witnesses have also let in evidence that the testator was not in sound disposing state of mind at the time of execution of the Will, the Courts below have rightly held that the Will was not proved to have been executed by the testator while he was in sound disposing state of mind and having regard to the strained relationship between the testator and the Appellant he could not have executed the Will, disbelieved the Will and dismissed the suit filed by the Appellant and decreed the suit filed by the 1st Respondent for partition. Therefore, I do not find any reason to interfere with the findings of the Courts below and the courts below were right in holding that the Will was not proved by the Appellant that the same was executed by the testator while he was not in sound disposing state of mind and there were a suspicious circumstances surrounding the execution of the Will.

10. It is true that in O.S. No. 458 of 1991 the Appellant mentioned about the Will while filing the written statement and while considering the prima facie case the Will was upheld by this Court in C.R.P. No. 3563 of 1993. Nevertheless, the suit was allowed to be withdrawn and No. final finding was given regarding the validity of the Will in O.S. No. 458 of 1991. Therefore the findings of this Court in C.R.P. No. 3563 of 1993 will not estop the 1st Respondent and the findings in C.R.P. No. 3563 of 1993 was only for limited purpose of finding out prima facie possession of the parties and till a final finding is given in the contested suit, the finding given in the Interlocutory Application will not bind the parties. As O.S. No. 458 of 1991 was allowed to be withdrawn by the Court and liberty was granted by the 1st Respondent, the finding in C.R.P. No. 3563 of 1993 will not bind the 1st Respondent. Hence, the substantial questions of law Nos. 1 and 2 are also answered against the Appellant.

11. In the result, the judgment and Decree of the Courts below are confirmed and the Second Appeals are dismissed. Consequently, the connected Miscellaneous Petition is also closed.