



A.S.No.136 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	09.11.2023
Pronounced on	31.01.2024

CORAM

THE HON'BLE MRS. JUSTICE K.GOVINDARAJAN THILAKAVADI

A.S.No.136 of 2012

and

M.P.No.1 of 2012

1.Kangambara Ammal (Died)

2.V.Mohan Doss

3.V.Chakkarapani

4.V.Gananam

5.Mohana

6.Kumari (Died)

7.M.Loganayagi

... Appellants

Versus

1.S.R. Vijaya Nirmala

2.J.Rajalakshmi

3.J.Murali Krishnan

4.Shanmugasundaram



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5.Perin Kumar

... Respondents

(A6 Died. A7, R4 and R5 impleaded. A7, R4 and R5 brought on record as LR's of the deceased sixth Appellant (Tmt.Kumari) vide Court order dated 21.07.2022 made in C.M.P.Nos.3215, 3216 and 3220 of 2022 in A.S.No.136 of 2012 by VBSJ)

Prayer : This appeal is filed under section 96 of Code of Civil Procedure, to set aside the judgment and decree dated 17.11.2011 made in O.S.No.63 of 2009 on the file of the Additional District and Sessions Judge, Fast Track Court-III, Tiruvallur.

For Appellants : Mr.R.Rajesh
(A2 to A5)

For Respondents : Mr.M.S.Subramanian for R1 to R3
: No Appearance for R4 and R5



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JUDGMENT

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This appeal is preferred as against the judgment and decree dated 17.11.2011 made in O.S.No.63 of 2009 on the file of the learned Additional District and Sessions Judge-III, Tiruvallur.

2. The respondents as plaintiffs filed a suit in O.S.No.63 of 2009 before the III Additional District and Sessions Judge, Tiruvallur, seeking for partition and separate possession in the suit properties. The learned III Additional District and Sessions Judge, Tiruvallur, by judgement and decreed dated 17.11.2011, decreed the suit.

3. Being dissatisfied with the findings arrived by the trial Court, the defendants have preferred the present appeal, praying to set aside the judgement and decree dated 17.11.2011 passed by the learned III Additional District and Sessions Judge, Tiruvallur.

4. For the sake of convenience herein after, the parties are referred to, as described before the trial Court.



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5.The averments made in the plaint, in brief as follows:

The suit properties originally owned by one K.Venugopal Chettiar viz., husband of the 1st defendant and father of defendants 2 to 6. the above properties are the self acquired properties of the said Venugopal Chettiar. The said Venugopal Chettiar had another son by name V.Jothi Doss who predeceased his father on 28.06.1991. The 1st plaintiff is the wife and the plaintiffs 2 & 3 are the daughter and son born to the 1st plaintiff through her husband late V.Jothi Doss. The said Venugopal Chettiar died intestate on 28.05.2001 leaving behind the plaintiffs and the defendants as his legal heirs. The said Venugopal Chettiar was running business in fancy goods in three shops at Thiruthani and had a very flourishing business. Out of his own earnings the suit properties were acquired by him. He had no ancestral properties. The plaintiffs together are entitled to 1/7th share in the suit properties. After the death of Venugopal Chettiar, the defendants 1 to 4 were giving small portion of income derived from the suit properties for their survival. Since the defendants became hostile towards the plaintiffs, the plaintiffs approached the defendants for amicable division of the properties.



But the defendants refused to give the share of the plaintiffs. Under such circumstances, the plaintiffs issued a legal notice on 27.01.2009 to the defendants 1 to 4 demanding partition. Though the defendants 1 to 4 received the said notices, failed to reply and divide the properties. The plaintiffs further submits that the house property referred in item 1 contains several residential portions and a sum of Rs.15,000/- is collected by the defendants as rent from the tenants occupying the said residential portions. The agricultural lands referred in the suit schedule are also yielding good income. Hence, the plaintiffs filed the above suit for partition and separate possession.

6.On the other hand, the defendants would submit that the suit properties were not acquired by K.Venugopal Chettiar out of his own earning. The 1st item of the suit property is a house property and self acquired property of K.Venugopal Chettiar. He had executed a Will on 09.03.2001 in favour of the 2nd, 3rd and 4th defendants herein. Therefore, the 1st item of the suit properties are the absolute properties of defendants 2 to 4 and the plaintiffs have no share in the said property. It is further submitted



that the suit item Nos.2 to 14 are the separate properties of the 1st defendant and the plaintiffs have no right to claim partition in the said properties. The 1st defendant has settled another extent of 0.06.0 hectare of land in survey no.60/15 belong to her in favour of the 2nd defendant under a register settlement deed dated 26.08.2009. Hence, none of the suit properties is available for partition between the plaintiffs and the defendants.

7.The Trial Court based on the above pleadings, framed the following issues :

1. Whether the Plaintiffs are entitled to 1/7th share in the suit properties ?
2. Whether the suit properties are the self acquired properties of Venugopal Chettiar ?
3. Whether the will dated 09.03.2001 alleged to be executed by Venugopal Chettiar in favour of Defendants 2 to 4 is true and valid and proved by Defendants ?
4. Whether the Defendants 2 to 4 are absolute owners of item 1 of the suit property ?



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5. Whether the items 2 to 14 of the suit properties are the absolute properties of first Defendant ?

6. To what relief ?

8. On the side of the Plaintiff, P.W.1 was examined and Ex.A1 to Ex.A5 were marked. On the side of the Defendants D.W.1 to D.W.3 were examined and Ex.B1 to Ex.B3 were marked. The Trial Court upon considering the averments made in the plaint and the written statements and considering the oral and documentary evidence laid in by the parties and also the arguments putforth by the respective counsel, passed the preliminary decree for partition in favour of the Plaintiffs. Aggrieved by this, the present appeal has been preferred by the Appellants/Defendants.

9. The learned counsel appearing for the appellants would submit that the trial Court erred in holding that, the will is not proved in accordance with law and also failed to take note of the fact that the Plaintiffs have not produced any evidence to show that item Nos.2 to 14 of the suit properties belong to late K.Venugopal Chettiar and also erred in rejecting Ex.B3-patta.



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simply on the ground stating that the same is obtained after suit. Hence, the judgment and decree, dated 17.11.2011 made in O.S.No.63 of 2009 on the file of the learned Additional District and Sessions Judge at Thiruttani is liable to be set aside and allow the present appeal suit.

10. On the other hand, the learned counsel appearing for the Respondents/plaintiffs would submit that the Defendants failed to prove the will in accordance with law and there is no documentary evidence to show that the Item No.2 to 14 belong to the 1st Defendant except for the patta which is marked as Ex.B3. He would submit that the Patta is not a document for title and it would not establish the title of the Defendants and therefore, the Trial Court has rightly passed the preliminary decree for partition in favour of the Plaintiffs which requires any interference.

11. Based on the above submissions, the following points arises for determination in this first appeal:

1.whether the Will dated 09.03.2001, is proved by the defendants in accordance to law?



2. Whether the defendants 2 to 4 are the absolute owners of the 1st item of the suit property?

3. Whether the item Nos.2 to 14 of the suit properties are the absolute properties of the 1st defendant?

4. Whether the suit properties are the self acquired properties of Venugopal Chettiar?

5. Whether the plaintiffs are entitled to 1/7 share in the suit properties

Point Nos.1 & 2:

12. The plaintiffs claim that the suit properties are the self acquired properties of late Venugopal Chettiar and that the plaintiffs as legal heirs of the predeceased son of Venugopal Chettiar, namely Jothi Doss are entitled together 1/7 share in the suit properties. Admittedly, the suit 1st item is a house property. The defendants also admit that the suit 1st item is the self acquired property of late Venugopal Chettiar. However, the defendants would claim that the said Venugopal Chettiar during his life time executed a Will on 09.03.2001 under Ex.B.1, bequeathing the 1st item in favour of the defendants 2 to 4 and therefore, the plaintiffs have no share in the said



property. From the above said contentions, it is clear that if the above said alleged Will (EX.B.1) dated 09.03.2001 executed by late Venugopal Chettiar is proved as genuine and valid document, then the plaintiffs are not entitled to any share in the above said property. The learned counsel submitted that the Court below has not properly considered the oral and documentary evidence adduced on the side of the defendants with regard to the execution of the said Will and therefore, the findings of the trial Court with regard to the said Will is perverse and also illegal. It is settled law that the propounder of the Will should prove the execution and attestation of the Will by removing all suspicious circumstances. Admittedly, Ex.B.1 Will is unregistered. While so, the defendants have to remove all suspicious circumstances to prove the Will. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free Will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on



the propounder to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof. Section 63 of the Indian Evidence Act lays down the mode and manner in which the execution of an unprivileged Will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the Court and capable of giving evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved atleast by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

13. In the instant case, on perusal of Ex.B1 Will alleged to have been executed by late Venugopal Chettiar on 09.03.2001 revealed that the above



said Venugopal Chettiar bequeathed the 1st item of the suit property in favour of the defendants 2 to 4. As pointed out earlier, it is well settled principles in law that the initial burden of proof that the Will has been validly executed and attested is only on the propounder of the Will. Therefore, it is the duty of the defendants who are the propounders of the Will to examine atleast one attesting witness to prove the execution and attestation of the alleged Will. On the side of the defendants, they have examined the 1st defendant as D.W.1 as attesor of the alleged Will. They have also examined the scribe of the Will as D.W.3. However, D.W.1 has deposed that her husband had executed only a partition deed and no other document was executed by him. Though in Ex.B.1 Will it is found that one Shajakhan had also attested the Will, the defendants failed to examine the said attesor to prove the genuinity of the Will. While D.W.1, one of the attesor did not say that Venugopal Chettiar executed a Will, the defendants ought to have examined the other attesor Shajakhan to prove the said Will. It is true that Section 68 of the Evidence Act does not say that both or all the attesting witness must be examined. Section 68 gives a concession to those who want to prove and establish a Will in a Court of law by examining



atleast one attesting witness. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a Will. To put in other wards, if one attesting witness can prove execution of the Will in terms of Clause (c) of Section 3, attestation by two attesting witnesses in the manner contemplated therein, the examination of the other attesting witness can be dispensed with. But, in the instant case, one of the attesting witness namely D.W.1 has clearly stated in her evidence that, during the life time of her husband late Venugopal Chettiar, he had only executed a partition deed and had not executed any other document. She had also stated that she do not remember who had signed and written the said document. The evidence of D.W.1 in this regard as extracted as hereunder:

"11. DW1 the first defendant in her evidence in cross examination deposed that, என் கணவர் இறந்த பிறகு 3 பிள்ளைகளுக்கும் நான்தான் முன்னின்று பாகப்பிரிவினை பத்திரம் எழுதிக் கொடுத்தேன்..... அந்த பத்திரம் யாரிடம் உள்ளது என்றால் 3 பேருக்கும் தனித்தனியாக 3 பத்திரம் உள்ளது. என் கணவர் இருக்கும்போது பத்திரம் எழுதி வைத்தாரா என்றால் அவர் இருக்கும்போது எழுதியதுதான் பாகப்பிரிவினை பத்திரம், என் கணவர் பாகப்பிரிவினை பத்திரம் தவிர வேறு பத்திரம் எழுதவில்லை. அந்த



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பத்திரத்தில் யார் சாட்சிக் கையெழுத்து போட்டுள்ளார்கள் என்றால் தற்போது ஞாபகம் இல்லை. பத்திரம் யார் எழுதியது என்று சொல்ல முடியாது..... சொத்து சம்மந்தப்பட்ட பத்திரங்கள் என் வக்கீலிடம் என்ன கொடுத்தேன் என்று தெரியாது. என் கணவர் பெரிய பிள்ளையை கூட்டிபோய் பத்திரம் எழுதினார். அந்த பத்திரம் என்னிடம் யாரும் படித்துக் காட்டவில்லை. அதில் உள்ள விவரங்கள் எனக்குத் தெரியாது."

14.The second defendant examined as D.W.2 deposed that his father executed Ex.B.1 Will. He did not depose that the 1st defendant was present at the time of execution of the Will and she had attested the same. His evidence is extracted as hereunder:

“சீனிவாசன் வழக்கறிஞர் அலுவலகத்தில் உயில் எழுதப்பட்டது. சீனிவாச வக்கீல் அவருடன் இருந்த ஜூனியர் வக்கீல் என் வீட்டுக் கொண்டு வந்தார்கள். வக்கீல் அப்பாவுக்கு படித்துக் காட்டினார். பிறகு அப்பா கையெழுத்து போட்டார். வேறு எதுவும் நடக்கவில்லை. சாஜி சாட்சி கையெழுத்து போட்டார். வேறு எதுவும் நடக்கவில்லை..... என் அம்மா, அப்பா இறந்த பிறகு உயிலை என்னிடம் எடுத்துக் கொடுத்தார்.”

15.Moreover, the defendants have examined one P.D.Ravichandran as D.W.3 said to be the scribe of the Will. However, there are contradictions in the evidence of D.W.2 and D.W.3 with regard to place of execution of the Will. According to D.W.2, the Will was executed in the house of one Srinivasan Advocate. Where as, D.W.3 deposed that he had



taken notes as dictated by Venugopal Chettiar and read over the same to him. He further deposed that the Venugopal chettiar came to the office of his Senior and asked him to write the Will. But, D.W.2 has deposed that the Will was prepared in the house of Srinivasan Advocate and was brought to his house and did not say that his father went to the Advocate's office. Further, D.W.2 deposed that his father asked him to bring the Advocate to his house for executing the Will. While so, the defendants ought to have examined the other attesting witness to prove the execution of the Will. Since D.W.1, one of the attestor did not say that Venugopal Chettiar executed a Will, the defendants in order to prove the execution of the Will should have examined the other attesting witness. The burden is on the defendants to establish that the said Venugopal Chettiar executed the alleged Will. The trial Court has rightly held that the Will cannot be taken into consideration, since there is lack of evidence. The trial Court also noticed some discrepancies in the signatures found in the Will and rightly held that there is no sufficient evidence to dispel any suspicion about the alleged Will and rightly discarded the Will as not proved. Therefore, when the evidence of attestor and other witness is not convincing to the conscience of Court,



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the Will must be held not proved. In this case, the evidence of the attesting witness namely D.W.1 is not convincing. Therefore, the appellants failed to prove the execution and attestation of Ex.B.1 Will by adducing reliable evidence of attesting witness. Therefore, the claim of the defendants that the defendants 2 to 4 are the absolute owners of the 1st item in the suit property by virtue of Ex.B.1 Will is unsustainable. The findings of the trial Court in this regard, is thereby confirmed.

16.The next contention of the appellants/defendants is that the items 2 to 14 are the separate properties of the 1st defendant. To establish the same, they have produced Ex.B.3 patta in the name of the 1st defendant. The trial Court has held that the said patta is obtained after the suit. Moreover, patta do not confers title. Patta is not a document of title. Except the said patta, no other documents produced by the defendants to establish that the suit item Nos.2 to 14 belong to the 1st defendant. The evidence of D.W.1 in this regard is extracted hereunder:

"சந்தானகோபாலபுரம் இடத்தை பார்த்திருக்கிறேன். எத்தனை ஏக்கர் என்று அவருக்குத்தான் தெரியும்..... என் அம்மா திருமணம் ஆன பிறகு



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என் பெரிய மகன் பிறப்பதற்கு முன்பாக பத்திரம் எழுதிக்கொடுத்தார்கள்.
வீட்டில் எனக்கு சொத்து எழுதிக் கொடுத்தார்கள். அந்த பத்திரம்
கிராமத்தில் கூரை வீட்டில் இருந்தபோது கூரையில் வைத்திருந்த பத்திரம்
தண்ணீர் பட்டு எழுத்துக்கள் அழிந்துவிட்டது. வழக்கு போடும் முன்பு
என் பெரிய பிள்ளை மீது எழுதி வைத்தேன்"

17. Therefore, there is no material on record to establish how the above mentioned properties were acquired by the 1st defendant. On the guise of patta alone, it cannot be construed that the 1st defendant is the absolute owner of the above properties. The Hon'ble Supreme Court in Sawarni Vs. Inder Kaur and Others reported in **(1996) 6 SCC 223** has held that, mutation of name in revenue records does not create or extinguish the title nor has any presumptive value on title. It only entitles the person concerned to pay the land revenue. In the absence of any material to show that how the 1st defendant acquired the above mentioned properties, it cannot be said that the 1st defendant has absolute right over the said properties. Except for the patta, no other document is produced to support the case of the defendants in this regard. The burden is on the defendants to establish that the suit item Nos.2 to 14 is the separate property of the 1st defendant. But, the same is not established by the defendants.

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18. Moreover, it is not disproved by the defendants that the suit properties were not acquired by late Venugopal Chettiar out of his own income. Moreover, D.W.1 and D.W.2 did not say that the plaintiffs have no share in the suit properties. The evidence of D.W.1 & D.W.2 is extracted as hereunder:

D.W.1 says,

"வாதிகளுக்கு அந்த சொத்தில் பங்கு உண்டா, இல்லையா என்றால்
பேரப்பிள்ளைகளை என்னிடம் காண்பிப்பது இல்லை, வந்து போவது
இல்லை. அதனால் பங்கு இல்லை."

19. Whereas, D.W.2 says, that the plaintiffs have relinquished their rights in the suit property. However, no document is produced to establish the same. Therefore, from the evidence of D.W.1 & D.W.2 it could be inferred that the plaintiffs have shares in the suit property. Hence, the trial Court is justified in passing a preliminary decree in favour of the plaintiff which calls for any interference.



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20. In the result, this Appeal Suit is dismissed. The judgement and decree of the Court of the Additional District and Sessions Judge, F.T.C.III, Thiruvallur, in O.S.No.63/2009 dated 17.11.2011 is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

31. 01.2024

mkn2

Index: Yes/No

Speaking Order : Yes/No

To

The Additional District and Sessions Judge,
Fast Track Court-III,
Tiruvallur



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K.GOVINDARAJAN THILAKAVADI,J.

Mkn2/vsn

PRE- DELIVERY JUDGEMENT MADE IN

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