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A.S.Nos.712 & 713 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.12.2023

PRONOUNCED ON : 10.01.2024

CORAM:

THE HON'BLE MR.JUSTICE **G.K.ILANTHIRAIYAN**

AS.Nos.712 & 713 of 2012 and
M.P.Nos.1 of 2012 & 1 of 2014

A.S.No.712 of 2012

T.Sudhakar

... Appellant

Vs.

1. Sadacharam
2. Pavadaisami(died)
3. Parimala
4. Kumari
5. Sundari
6. V.Padmanabhan
7. Aboorvam Ammal (Died)
8. Punidhan
9. Jayaseelan
10. Premnath
11. Annaselvam
12. Dakshinamoorthy

...Respondents

(R11 and R12 brought on record

as LR's of deceased

respondents 2 & 7 vide order dated

17.07.2023 made in

C.M.P.Nos.10040,10044 & 10042/2022

C.M.P.Nos.10839,10840,10842/2022 dt 17.07.2023

in A.S.No.712 of 2012)



A.S.Nos.712 & 713 of 2012

PRAYER: Appeal Suit is filed under Section 96 of CPC against the judgment and decree dated 14.11.2011 passed in O.S.No.88 of 2009 on the file of the learned Additional District Judge (Fast Track Judge-II), Cuddalore.

A.S.No.713 of 2012

1. Dakshinamoorthy
2. Dineshkumar
3. Sudhakar

... Appellants

Vs.

1. Aboorvam Ammal
2. Sadacharam
3. Pavadaisami (died)
4. Padmanabhan
5. Parimala
6. Kumari
7. Sundari

8. Annaselvam (died)

... Respondents

(R8 brought on record
as LR of deceased
respondent 3 vide order dated
17.07.2023 made in
C.M.P.Nos.10937,10936 & 10930/2022
in A.S.No.713 of 2012)

PRAYER: Appeal Suit is filed under Section 96 of CPC against the judgment and decree dated 14.11.2011 passed in O.S.No.101 of 2008 on the file of the learned Additional District Judge (Fast Track Judge-II), Cuddalore.



A.S.Nos.712 & 713 of 2012

(In A.S.No.712 of 2012)

For Appellant : Mr.R.Gururaj

For Respondents

1, 3 to 6 and 11 : Mr.P.Dinesh Kumar
for Mr.D.Raivchander

For Respondents 8 to 10,
12 : No appearance

(In A.S.No.713 of 2012)

For Appellant : Mr.R.Gururaj

For Respondents

2, 4 to 7 and 8 : Mr.P.Dinesh Kumar
for Mr.D.Raivchander

COMMON JUDGEMENT

The plaintiff in O.S.No.88 of 2009 and the 3rd defendant in O.S.No.101 of 2008 is the appellant in A.S.No.712 of 2012. The plaintiffs in O.S.No.101 of 2008 and the defendants in O.S.No.88 of 2009 are the respondents in A.S.No.713 of 2012.



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2. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

3. The plaintiffs in O.S.No.101 of 2008 filed the suit for partition and the plaintiff in O.S.No.88 of 2009 filed the suit for declaration and injunction. In both suits, suit property is one and the same and the parties are one and the same. Therefore, the trial Court passed common judgement and decree dated 14.11.2011 in both the suits.

4. The case of the plaintiffs in O.S.No.101 of 2008 is that the suit property originally belonged to one Vadivel Pillai, who is the father of Vijayarangam Pillai. The first item of the suit property was purchased by him under registered sale deed dated 18.05.1994 and the second item of the suit property is the ancestral property. After demise of said Vadivel Pillai, the said properties were devolved on his son Vijayarangam Pillai. The suit properties are the joint family co-parcenary properties of said Vijayarangam Pillai and plaintiffs 2 to 7 and 1st defendant. They are entitled to have 1/8th share on the demise of Vijayarangam Pillai, who died intestate on



27.06.2008. Therefore, each plaintiff and the first defendant are entitled to have 9/64th share in the suit properties. The defendants 2 and 3 in O.S.No.101 of 2008 are the sons of the 1st defendant. The 1st defendant issued notice to the plaintiffs on 12.07.2008, claiming that the 1st defendant had executed a registered settlement deed in their favour in respect of the suit properties on 23.05.2006. Since the suit properties are the joint family properties, the first defendant had no right or title over the property to execute settlement deed in favour of his sons. Hence the suit for partition.

5. The case of the plaintiff in O.S.No.88 of 2009 is that the suit properties were derived by his grandfather. Before demise of Vadivel Pillai, he had executed a settlement deed dated 23.05.2006 in favour of the plaintiff and his brother one, Dinesh Kumar. Thereafter, he died on 27.06.2008 intestate leaving behind the defendants as his legal heirs. Immediately, after settlement deed, they accepted the settlement deed and had taken possession of the suit properties. The revenue records were also mutated in their name and they cultivated in the suit properties. However,



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the defendants in order to grab the property, they trespassed into the suit property and create problem. Therefore, they also lodged a complaint and filed a suit for declaration and permanent injunction. The plaint filed by the plaintiff is the written statement for other suit filed by the defendants. After completion of pleading in both the suits, the trial court framed following issues in O.S.No.101 of 2008:

1. இவ்வழக்கு நிலைக்கத்தக்கதா?
2. வழக்குச் சொத்துக்களில் வாதிகளுக்கு 55/64 பாகம் கிடைக்கத்தக்கதா?
3. வாதிகள் கோரிய பரிகாரங்கள் அவர்களுக்கு கிடைக்கத்தக்கதா?
4. வாதிகளுக்கு கிடைக்கக்கூடிய இதர பரிகாரங்கள் என்ன?

In O.S.No.101 of 2008, the trial court also framed the following additional issues:

1. 4ம் வாதி 22.05.1992 மற்றும் 02.06.1992 தேதியிட்ட கிரயப்பத்திரங்கள் மூலம் கிரயம் பெற்ற சொத்துக்கள் கூட்டுக்குடும்ப சொத்துக்களா?

After completion of pleadings in O.S.No.88 of 2009, the trial court framed the following issues :

1. 23.05.2006ம் தேதியிட்ட செட்டில்மெண்ட் பத்திரம் உண்மையானதா, செல்லத்தக்கதா, ஏற்றுக்கொள்ளப்பட்டதாக மற்றும் நடைமுறைக்கு வந்துவிட்டதா?



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2. வாதி மற்றும் திணைஉக்குமார் வழக்குச்சொத்தின் உரிமையாளர்களா?

3. வாதி கோரியவாறு விளம்புகை பரிகாரம் அவருக்கு கிடைக்கத்தக்கதா?

4. வழக்குச் சொத்தில் வாதி சுவாதீனம் மற்றும் அனுபவத்தில் இருந்துவருகிறாரா?

5. வாதிக்கு வழக்கில் கோரியவாறு நிரந்தர உறுத்துக்கட்டளை பரிகாரம் கிடைக்கத்தக்கதா?

6. வாதிக்கு கிடைக்கக்கூடிய இதர பரிகாரங்கள் என்ன?

6. In Both the suits P.W.1 & P.W.2 were examined and marked exhibits A1 to A8. On the side of the defendants they had examined D.W.1 to D.W.5 and marked exhibits B1 to B41. On perusal of the oral and documentary evidence, the trial Court allowed the suit for partition and dismissed the suit for declaration and injunction. Aggrieved by both the judgements and decrees, plaintiff in O.S.No.88 of 2009 and the defendants in O.S.No.101 of 2008 have preferred these appeal suits.

7. The learned counsel for the plaintiffs submitted that insofar as the first item of the suit property itself is a self-acquired property of Vadivel Pillai. Insofar as 2nd item of the suit property is concerned, it is an ancestral



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property and as such they are not pressing the suit as far as the 2nd item of the suit property. The first item of the suit property is being the self-acquired property of Vadivel Pillai, it was devolved after his demise on the plaintiff's grandfather. In turn, he settled the property in favour of the plaintiffs and his brother. Thereafter, they had taken possession of the suit properties and also mutated the revenue records in their favour. Therefore, first item of the suit property cannot be subjected for any partition among the family members. On the strength of the settlement deed, the plaintiff filed a suit for declaration and permanent injunction. The grandfather derived title over the 1st item of the suit property through Will executed by his father. It was a registered one and the same was 30 years old. Further, the witnesses died. Even then it is presumed to be proved, since the registered Will is aged more than 30 years. Insofar as the settlement deed is concerned, it was categorically proved by the plaintiff by examining the testators. Even without considering the same, the trial Court dismissed the suit for declaration and injunction in toto and allowed the suit for partition filed by the defendants.



8. The learned counsel for the defendants would submit that the Will was not proved in the manner known to law. Though, the witnesses died, the plaintiff ought to have proved the WILL as per Section 90 of the Indian Evidence Act. Therefore, the trial Court rightly allowed the suit for partition and dismissed the suit for declaration and injunction. On submission of either side, the following points arise in these appeal suits:

i) Whether the plaintiff proved the WILL (Ex.B.11) in the manner known to law?

ii) Whether the plaintiff is entitled for the relief of declaration and injunction as far as the first item of the suit property?

9. The plaintiffs in O.S.No.101 of 2008 and the first defendant are the legal heirs of Vijayarangam Pillai. The said Vijayarangam Pillai is the only son of Vadivel Pillai. The said Vadivel Pillai had purchased the first item of the suit property by the registered sale deed dated 18.05.1944. The 2nd item of the suit property is an ancestral property to Vadivel Pillai. After his



demise, the entire property was devolved in favour of one, Vijayarangam Pillai. According to the plaintiff in O.S.No.101 of 2008, only from the income derived from the ancestral property of Vadivel Pillai, he had purchased the first item of the suit property by registered sale deed dated 18.05.1944. After his demise, both the items of the suit properties were devolved to his only son Vijayarangam Pillai. Therefore, the plaintiff and the first defendant are enjoyed the properties and the properties became co-parcener property of Vijayarangam Pillai. However, the plaintiffs in O.S.No.88 of 2009 claimed both the properties on the ground that the said Vadivel Pillai had executed a WILL dated 25.10.1971 in favour of his son Vijayarangam Pillai. He had executed settlement deed in favour of his grandsons i.e., the defendants 2 and 3.

10. The plaintiff in O.S.No.88 of 2009 is the son of Takshinamoorthy. The same was duly accepted and acted upon. Thereafter, they were mutated the revenue records in their favour and also issued Patta. The defendants had taken specific stand that the said Vijayarangam Pillai died at the age of 104 years and he was bedridden for the past ten years. Therefore, he did



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not settle the properties in favour of the 2nd and 3rd defendants. They fabricated the settlement deed as if the entire suit property settled in their favour. In order to prove the settlement deed dated 23.05.2006, the defendants had examined the witnesses as D.W.2 and D.W.3 and the scribe of settlement deed was examined as D.W.4. Further, the WILL executed by the Vadivel Pillai in respect of the first item of the suit property was not proved in accordance with law. He had no right over the property to execute WILL in favour of his son, since it was purchased from the income derived by the ancestral property. The law is well settled that if members of a joint family who are joint in status and carry on business and acquire property by their joint labour and exertions without the aid of any ancestral nucleus the presumption is that the property so acquired by them would be joint family property in which sons of the acquires would get a right by birth. Unless it is proved that the acquires intended to own the property as co-owners between themselves, in which case alone it will be joint property as distinguished from joint family property. The presumption is infavour of its being regarded as joint family property.



11. On perusal of the evidence, though the defendants examined D.W.2 to D.W.4 in order to prove the settlement deed, on perusal of the deposition, they failed to prove the settlement deed in the manner known to law, since they have no essence of execution of the settlement deed. That apart, at the time of execution of settlement deed, Vijayarangam Pillai was aged about 104 years. That apart, on the strength of the WILL executed in favour of Vijayarangam Pillai, settlement deed was executed by him. Further, WILL itself was not proved in the manner known to law. In this regard, the learned counsel for the defendant relied upon the judgement in the case of *Ashutosh Samanta and others vs SM.Rajan Bala Dasi and others* reported in **2023 SCC online SC 255**, in which the Hon'ble Supreme Court of India held as follows:

"12. This Court, in M.B.Ramesh (D) by L.Rs. V. K.M.Veeraje Urs (D) by L.Rs., while dealing with a similar argument regarding applicability of Section 90 in the case of proof of will, held as follows:



*"At the same time we cannot accept the submission on behalf of the Respondents as well that merely because the will was more than 30 years old, a presumption under section 90 of the Indian Evidence Act, 1872 (Evidence Act for short) ought to be drawn that the document has been duly executed and attested by the persons by whom it purports to have been executed and attested. As held by this Court in *Bharpur Singh vs. Shamsher Singh* reported in (2009) 3 SCC 687, a presumption regarding documents 30 years old does not apply to a will. A will has to be proved in terms of Section 63(c) of the Succession Act read with Section 68 of the Evidence Act.*

13. In view of the above decision, wills cannot be proved only on the basis of their age - the presumption under section 90 as to the regularity of documents more than 30 years of age is inapplicable when it come to proof of wills, which have to be proved in terms of Sections 63(c) of the Succession Act, 1925, and Section 68 of the Evidence Act, 1872.

14. There are often situations when wills which otherwise may have satisfied the requirements of being attested, as provided by law, cannot be proved in terms of the said two provisions, for the reason that the attesting witnesses are not available, or if one of the witnesses denies having



attested the will. Sections 69 and 71 of the Evidence Act, 1872 then come to the aid of the propounder. Section 69 reads as follows:

"Section 69- Proof where no attesting witness found

If not such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the documents is in the handwriting of that person."

15. Section.71 reads as follows:

Section.71 - Proof when attesting witness denies the execution

If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

12. Therefore, it is clear that in the event where attesting witness may have died, or cannot be found, the propounder is not helpless, as section 69 of the Evidence Act, 1872 is applicable. Since, both the attesting witnesses



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have not been examined, in terms of section 69 of the Act it was incumbent upon the plaintiff to prove that the attestation of atleast one attesting witness is in his handwriting and that the signature of the person executing the document is in the handwriting of that person.

13. The learned counsel for the plaintiff vehemently contended that the Will is aged about more than 30 years and it is registered one. Therefore, as per section 90 of the Indian Evidence Act, the court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. Therefore, the judgements cited by the learned counsel for the plaintiffs are not helpful to the case on hand.



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14. In view of the above observation, all the points are answered against the plaintiffs and the trial Court rightly allowed the suit for partition and dismissed the suit for declaration and injunction. Hence, this court finds no infirmity or illegality in the judgements and decrees passed by the trial court. Accordingly, the judgements and decrees passed in O.S.No.101 of 2008 and O.S.No.88 of 2009 dated 14.11.2011 on the file of learned Additional District Judge (Fast Track Judge-II), Cuaddlore are confirmed and both the appeal suits are dismissed. Consequently, connected miscellaneous petitions are closed.

10.01.2024

Index : Yes / No

Internet : Yes / No

Speaking order /Non-speaking order

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To

1. The Additional District Judge (Fast Track Judge-II),
Cuaddlore.
2. The Section Officer,
Vernacular Records Section,
High Court Madras.



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G.K.ILANTHIRAIYAN, J.

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AS.Nos.712 & 713 of 2012 and
M.P.Nos.1 of 2012 & 1 of 2014

10.01.2024