

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.06.2015

CORAM:

THE HONOURABLE MS.JUSTICE R.MALA

Appeal Suit No.864 of 2014
and
M.P.No.1 of 2014

1.M.Manonmani
2.R.Visagalakshmi

... Appellants/Plaintiffs

Vs

1.S.Natarajan
2.S.Singaravelu
3.T.Gokilambal
4.S.Duraisingam
5.M.Seethalakshmi
6.M.Arumugam
7.M.Senthilkumar
8.Sowrirajan
9.Baskaran
10.B.Hari
11.M.Usha
12.M.Shanthi
13.M.Mahalakshmi

... Respondents/Defendants

Prayer: This Appeal Suit has been preferred under Section 96 of C.P.C., praying to set aside the judgment and decree dated 26.08.2014 made in O.S.No.68 of 2011 on the file of the District Court, Karaikal and consequently allow the appeal suit.

For Appellants : Mr.K.Sivakumar

For Respondents 2 to 7 : Mr.G.Ilanthiraiyan for
M/S.Sai, Bharath and Ilan

JUDGMENT

This appeal suit arises out of the judgment and decree dated 26.08.2014 made in O.S.No.68 of 2011 on the file of the District Court, Karaikal.

2.The averments made in the plaint are as follows:

(i)The plaintiffs and defendants are brothers and sisters. They are the issues of one Subramania Pillai. He married Dhanam as first wife and through her, first plaintiff and the defendants 1 to 4 were born. After the death of Dhanam, he married Govindammal as second wife, through whom, the second plaintiff and 5th defendant were born. Since the said Subramania Pillai died intestate on 16.01.1983, his legal heirs, who are plaintiffs and defendants inherited the properties. The second wife Govindammal died in the year 2008. As the defendants evaded to divide the estate and give due shares to the plaintiffs, the plaintiffs filed a suit for partition and separate possession of 2/7th shares in the suit property stating that the properties are separate properties of their father Subramania Pillai. Thus, they prayed for decree.

3.The gist and essence of the written statement filed by the fifth defendant adopted by the defendants 1 to 4 are as follows:

(i)The plaintiffs have no locus standi to maintain a suit for partition claiming as if they are the co-owners to the defendants herein. The plaintiffs with an intention to make unlawful gain, have given an exaggerated value of the suit properties. If the plaintiffs are genuine in their claim, they ought to have come up with a comprehensive suit to declare their entitlement over the suit properties and for possession. The suit has been filed without production of any documents in relation to the suit properties. The defendants admitted the marriage of their father Subramania Pillai and the plaintiffs are their sisters. The plaintiffs have no cordial relationship with the defendant's family. The plaintiffs purposely suppressed the issuance of first advocate notice.

(ii)Subramania Pillai during his life time executed a last Will on 31.03.1981 stating that the suit properties are allotted to his grand sons by granting life estate to his sons viz., the defendants 1, 2, 3 and 5. Some of the items were sold to the third party based on the Will and the same was known to the plaintiffs. Subramania Pillai had assigned valid reasons for not allotting any property to their daughters viz., plaintiffs and the fourth defendant herein as he had gifted all kinds of seer varisais to them.

(iii)The Will is absolutely valid in the eye of law and the same is binding on the plaintiffs and they have no right to claim partition of the suit properties. Therefore, the defendants prayed for dismissal of the suit.

4.During pendency of the suit, since the first defendant died, his legal heirs were impleaded as defendants 6 to 14.

5.The trial Court, after considering the averments both in the plaint and the written statement and arguments of both the counsel, framed six issues and considering the oral evidence of P.W.1, D.W.1 and documentary evidence of Exs.A1 to A6 and Exs.B1 to B13, dismissed the suit, against which, the present first appeal has been preferred by the appellants/plaintiffs.

6.After hearing the arguments of both sides counsel, the following points for consideration are framed:

1.Whether Coramendel Hindu Law of Pondicherry is applicable to the parties herein, since they are natives of Tamil Nadu?

2.Whether the Will is proved in accordance with the law?

3.Whether the decree and judgment passed by the trial Court is sustainable?

7.Challenging the findings rendered by the trial Court, learned counsel for the plaintiffs/appellants submits that the properties situated within the jurisdiction of Pondicherry. As per Coramendel Hindu Law of Pondicherry, any gracious transfer made by Hindu male in excess of 1/8th share will not bind his legal heirs. He further submits that Ex.B10 Will is not proved in accordance with the law. Therefore, he prayed for allowing this appeal. To substantiate his arguments, he relied upon the decision reported in 2012 (3) CTC 577 (Thananjayan @ Murugesan and others v. Palani @ Boologanathan (died) and his legal heirs);

8.Learned counsel for the respondents fairly conceded that attesor of the Will was not examined before the Court, since the Will is 30 years old document, there is no need to prove attestation. For the reason, he relied upon the following judgments:

(i) (2008) 5 MLJ 500 (Minor Mani, rep. by next friend/mother Ramayi, w/o Selvaraj Harijan colony, Thimmalai Village, Kallakurichi Taluk v. Ammakannu and another);

(ii) 2011 (5) CTC 813 (Murugayee (dead) represented by her legal heir Meenakshi v. Suguna Sambandam and others);

9.Considered the rival submissions made on both sides and perused the materials available on record.

10.The admitted facts are as follows:

The properties are separate properties of one Subramania Pillai and his first wife is Dhanam, through her, the first plaintiff and defendants 1 to 4 were born. During pendency of the suit, the first defendant died and hence, his legal heirs were impleaded as defendants 6 to 14. After the death of first wife Dhanam, Subramania

Pillai married one Govindammal and through her, he had begotten second plaintiff and fifth defendant.

Point No.1:

11.Now this Court has to decide whether Coramendel Hindu Law of Pondicherry is applicable to the parties herein? As per the decision relied upon by the learned counsel for the plaintiffs/appellants reported in 2012 (3) CTC 577 (Thananjayan @ Murugesan and others v. Palani @ Boologanathan (died) and his legal heirs), execution of Will by the father more than 1/8th share will not bind his legal heirs.

12.As per the evidence of P.W.1/Visagalakshmi/second plaintiff, Subramania Pillai is the native of Tamil Nadu and for avocation, his family had come to Karaikal. In such circumstances, the parties herein are natives of Tamil Nadu. Therefore, the Coramendel Hindu Law of Pondicherry is not applicable to the parties herein and hence, the argument advanced by the learned counsel for the appellants/plaintiffs in this aspect does not merit acceptance. Point No.1 is answered against the appellants/plaintiffs.

Point No.2:

13.It is true, the respondents herein putforth their case on the basis of the Will under Ex.B10. As per the Indian Evidence Act and Indian Succession Act, the Will has to be proved in accordance with law. So it is appropriate to extract Section 68, which runs as follows:

"68.Proof of execution of document required by law to be attested: - If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

[Provided that it shall be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]"

14.As per Section 69 of the Evidence Act, if the document is 30 years old and if the attestors of the document are not available, Section 69 of the Evidence Act can be invoked in accordance with law.

15. On perusal of the evidence of D.W.1/5th defendant, it reveals that no iota of evidence shows that attesor of the Will was dead or not available. Moreover, no one acquaintance with the signature of the attesor are available. At this juncture, it is appropriate to consider the following decision relied upon by the learned counsel for the respondents:

(i) In 2011 (5) CTC 813 (Murugayee (dead) represented by her legal heir Meenakshi v. Suguna Sambandam and others), in para-10, it is held as follows:

"10. It is not in controversy that the attesor to Ex.A.1-Will are no more. Similarly, in order to prove the Will by examining the persons, who were well acquainted with the signatures of the attesting witnesses, they were also not available. Therefore, Section 69 of the Evidence Act could not be complied with by the plaintiff. Thus, the Will has not been proved by examining either one of the attesting witnesses to the Will or any of the persons who were well acquainted with the signature of the Attestors. In those circumstances, the next question which crops up for consideration is, whether a presumption regarding due execution and attestation as provided in Section 90 of the Evidence Act could be invoked in this case in favour of the Plaintiff."

But the above decision is not applicable to the facts of the present case. Because, in that decision it was held that document is 30 years old and there was an evidence that the attesor of the Will is no more and a person who well acquainted with the signature of the attesor is also not available. In such circumstances, it was held that if document is 30 years old and comes from proper custody, presumption in respect of due execution and attestation can be drawn by invoking Section 90 of Evidence Act. In the case on hand, no evidence was let in to prove that the attesor of the Will was neither alive nor dead.

(ii) In (2008) 5 MLJ 500 (Minor Mani, rep. by next friend/mother Ramayi, w/o Selvaraj Harijan colony, Thimmalai Village, Kallakurichi Taluk v. Ammakannu and another), it was held that the attesting witnesses not examined, since the execution of the Will is admitted, no proof is necessary. In the above decision, it was specifically held that the defendant was in possession and enjoyment of the suit property and none of the attestors was alive. It clearly shows that the attesor in the above case was dead. In the case on hand, no such evidence was available to show that whether the attesor of the Will was alive or dead. Under such circumstances, the above decision is not applicable to the facts of the present case.

16.Learned counsel for the respondents mainly focussed upon the evidence of P.W.1, who deposed that signature in Ex.B10 Will is belonging to her father. Merely because she admitted that the signature in the Will belongs to her father, it will not amount that her father had executed the Will.

17.According to the learned counsel for the appellants/plaintiffs, once the second plaintiff/P.W.1 admitted that the signature in the Will belongs to her father, the matter has to be remitted back to the trial Court for giving opportunity to examine the attestors to prove the genuineness of the Will.

18.Considering the above submission made by the learned counsel for the plaintiffs/appellants, I am of the view, since the right of the property has been involved, it is a fit case for remitting the matter back to the trial Court with a direction to decide the fact that whether Ex.B10 Will is true and genuine after giving opportunity to both sides and after examining attestor of the Will in accordance with the law. Hence, the judgment and decree passed by the trial Court are hereby set aside and the matter is remitted back to the trial Court for deciding the same on merits as stated below.

19.In the result,

- First Appeal is allowed by setting aside the decree and judgment passed by the trial Court.
- Court fee already paid by the appellants/plaintiffs is refunded to them.
- The matter is remitted back to the trial Court with a direction to decide whether the Will is true and genuine after examining the attestor of the Will and after giving opportunity to both sides and to dispose of the matter within a period of three months from the date of receipt of material papers.
- Consequently, connected Miscellaneous petition is closed.
- There shall be no order as to costs.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

The District Judge,
Karaikal.

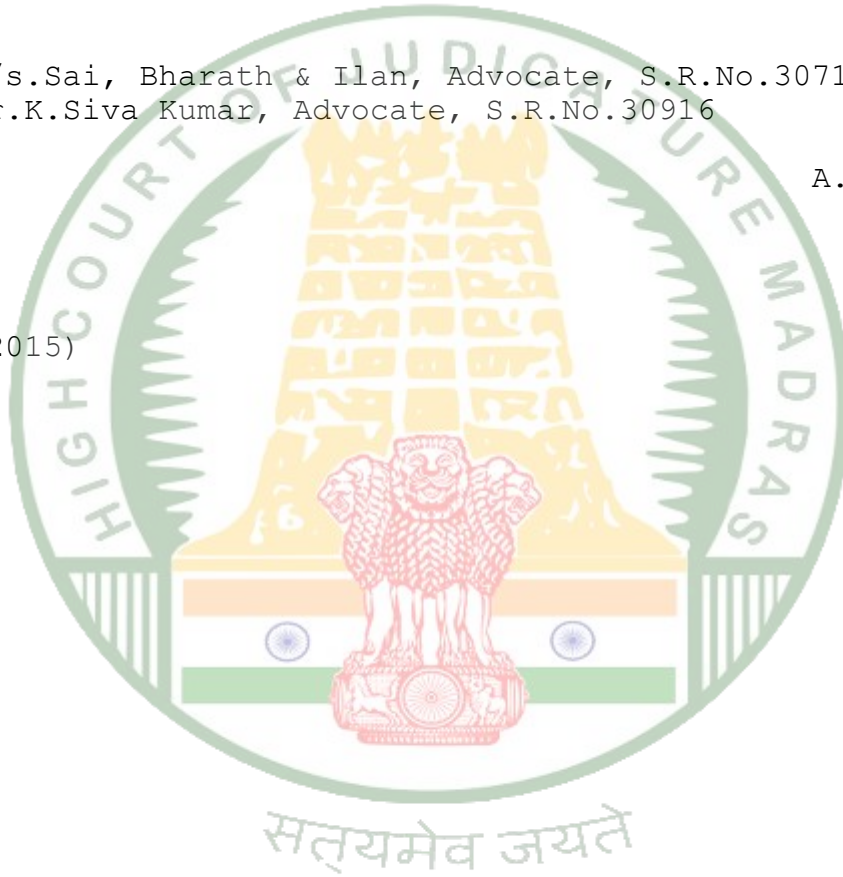
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The Section Officer,
V.R.Section,
High Court, Madras

+1cc to M/s.Sai, Bharath & Ilan, Advocate, S.R.No.30713
+1cc to Mr.K.Siva Kumar, Advocate, S.R.No.30916

A.S.No.864 of 2014
and
M.P.No.1 of 2014

JSV(CO)
CA(29/07/2015)



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