

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 08.02.2007

Coram:

The Honourable Mr.Justice J.A.K.SAMPATH KUMAR

A.S.No.469 of 1992

Karuppa Konar @
Porikharar Karuppa Konar(deceased) .. Appellant / 2nd defendant

2. K. Aruchamy
3. Karuppathal
4. K. Karoppusamy
5. K. Palanisamy

Appellants 2 to 5 B/R as LR's of the
deceased sole Appellant vide order
dated 7.12.2006 made in CMP.Nos.
10337 to 10342/2006.

Vs.

1. Chinnathayee(deceased) .. Respondent-1 / Plaintiff
2. Thulasi
3. Mounaswamy .. Respondents-2 & 3 /Defendants 1 & 3
4. R. Varadharajan
5. R. Suresh Kumar
6. R. Velumani
7. R. Boopathi
8. R. Bhuvaneswari

R4 to 8 B/R as LR's of the deceased
1st respondent vide order dated 7.12.2006
made in CMP.No.9836/06

***R.4 to R.8 rep. By their Power Agent
Thiru T.R.Palanisamy.**

The Appeal is filed Under Section 96 of the Civil Procedure
Code against the Judgment and decree dated 14.01.1992 made in O.S.No.230
of 1987, on the file of Second Additional Subordinate Judge, Coimbatore.

For Appellant : Mr.R.Saseetharan
For Respondents: Mr.V.Lakshminarayanan
4 to 8 For M/s. V. Raghavachari
Respondent No.2: Mr. R. Ravikumar
Respondent No.3: No Appearance

JUDGMENT

This appeal is filed against the Judgment dated 14.01.1992 in O.S.No.230 of 1987 on the file of Sub Court, Coimbatore in and by which the learned Second Additional Subordinate Judge after analysing the records found that the the plaintiff is entitled for suit claim and accordingly decreed the suit. The second defendant is the appellant herein.

2. For convenience, the parties are referred as arrayed in the Original Suit. The brief facts of the appellant case are as follows:-

The plaintiff and the first defendant are the sisters and their grand mother was Palaniammal. The second defendant is the brother-in-law of the said Palaniammal. The said Palaniammal was the owner of the suit properties. The said Palaniammal executed a Will dated 11.12.1967 bequeathing her properties in favour of her two daughters namely Kaliammal and Rangammal. Rangammal died without marriage and hence her share also fell to her sister Kaliammal. The plaintiff and the first defendant are the daughters and the legal heirs of Kaliammal. Thus, the plaintiff and first defendant are the absolute owners of the suit properties and they are in possession and enjoyment thereof. The second defendant has no title or interest or share in the suit property. He is claiming to be an heir of Rangammal is interfering with the rights and possession of the plaintiff. The third defendant is a total stranger and he is powerful and influential. Aided by him the second defendant is doing injurious acts with a view to cause loss and troubles to the plaintiff. It is very unfortunate that the first defendant is also misguided by the defendants 2 and 3 and she is supporting them. In view of this, it is no longer possible for the plaintiff to have joint ownership or possession and hence this suit is filed for the relief of partition and separate possession. Hence the suit.

3. The Written statement filed by the first defendant reads as follows:

Rangammal died only after marriage without any issues. The husband of Rangammal is also dead. The property mentioned in the item No.2 which was a site with an extent of 10 cents, was sold out by the grand mother of the plaintiff herself. The deceased Palaniammal had executed only one Will in her lifetime and it was the Will dated 11.12.1967. The Will dated 11.12.1967 is the real and genuine Will. The Will or document dated 3.12.1974 was not executed by Palaniammal. In

the year 1974 the said Palaniammal was incapable of executing any Will. From the year 1973 onwards, Palaniammal was unwell, she was bedridden, she was not mentally alright and she was not in a fit condition to execute any registered document and hence she did not and could not have executed a Will on 3.12.1974. According to this defendant, the alleged Will dated 3.12.1974 is a forged and fabricated document and it was brought about by impersonation. Item No.1 of suit properties having an extent of 1 acre and 54 ½ cents is in the joint possession and enjoyment of the plaintiff and the defendant-1. Both Chinnathayee and this defendant is in joint possession and enjoyment of the first item of the suit property. In the third item namely the house property, this defendant is in possession and enjoyment exclusively. The plaintiff and this defendant are entitled to ½ share each in the first and third items of the suit properties and hence the suit may be decreed.

4. The Written statement filed by the second defendant and adopted by the third defendant reads as follows:

It is true that the said Palaniammal had executed a Will dated 11.12.1967 whereby she bequeathed the suit properties to the plaintiff's mother and her sister Rangammal. But Subsequently, the said Palaniammal cancelled this Will dated 11.12.1967 and executed another registered Will dated 3.12.1974 whereby she bequeathed the suit properties in favour of the second defendant who is non other than the said Palaniammal's husband's own brother's son. By virtue of the registered Will dated 3.12.1974, the second defendant after the demise of the said Palaniammal i.e. on 10.01.1975 became the absolute owner of the properties and he was in possession and enjoyment of the properties. So far regarding the item No.2 of the plaint mentioned properties the said Palaniammal herself sold it away during her life time. The plaintiff closing her eyes for all the realities filed this vexatious suit. Regarding item 3 of the suit properties, it has been transferred in the name of second defendant in the property register on 19.2.1975 itself and in possession and enjoyment of the properties. The second defendant who was in possession and enjoyment of the properties, had partitioned item No.1 of the suit properties on 11.12.1981 with his sons and sold away the same and it is in the hands of the third parties. Hence the suit is liable to be dismissed.

5. Plaintiff was examined as P.W.1. Ex.A1 marked on the side of plaintiff to prove her claim. First defendant was examined as D.W.1. Aruchamy and Krishnaswamy were examined as D.W.2 and D.W.3. Exs.B1 to B7 were marked on the side of the defendants to disprove the suit claim of the plaintiff.

6. The lower Court after analysing the evidence in depth held that the plaintiff is entitled to the suit claim and accordingly decreed the suit. The present appeal is filed by the second defendant against such finding.

7. Heard Mr. Mr.R.Saseetharan, learned counsel appeared for the Appellant/defendant 2 and Mr.V.Lakshminarayanan, learned counsel appeared

for the Respondent /Plaintiff and defendant 1. No one appeared on the side of the respondent / third defendant.

8. Upon hearing the arguments of the learned counsel for the appellants and respondents, the points for consideration are

(i) Whether the second item of suit property is available for partition ?

(ii) Whether the second and third defendants are co-sharers of the suit property along with the plaintiff and first defendant if not whether the suit against them for partition is maintainable ?

(iii) Whether the Will dated 11.12.67 executed by the late Palaniammal in favour of the plaintiff and the first defendant is valid in law ?

(iv) Whether the Will dated 03.12.74 alleged to have been executed by the late Palaniammal cancelling the first Will dated 11.12.67 in favour of the second defendant has got legal sanctity ?

(v) Whether the partition decree in respect of the second item of property is in order ?

(vi) Whether the first and third item of the suit property is in possession of the plaintiff ?

(vii) Whether the third item of suit property is related to the Will dated 11.12.67 ?

(viii) Whether the third item of suit property is in possession of the second defendant ?

(ix) Whether the first item of suit property is available for partition as the same was alleged to have been sold by the second defendant in favour of the third parties ?

(x) Whether the finding of the lower court in decreeing the suit is in order ?

9. Point No.1 :

Admittedly, the second item of suit property is not available for partition. According to the case of the parties to the proceedings the second item of the suit property was already sold by late Palaniammal while she was alive. The lower appellate Court also rendered a specific finding that the second item of property was not available for partition. The finding of the lower Court in this regard reads as follows:

„uz;lhtJ capy; brhjjJ gHdpak;khs; capUld; ,
Uf;Fk;ngHj tpw;W tpl;lhy; mJ FwpjJ thjp jug;gpy;

ve;jtpjkhhd ghpfhukK; nfl;f KoahJ/"

In the written statement, it is stated that "the property mentioned in the item No.2 which was a site with an extent of 10 cents was sold out by the grand mother of the plaintiff herself." In the written statement of the second defendant adopted by the third defendant, it is stated that "so far regarding the item No.2 of the plaint mentioned property said Palaniammal herself during her lifetime sold it away".

10. Narration of events would prove that the second item of plaint schedule property is not available for partition. Whereas the lower court though rendered specific finding that the second item of property is not available, decreed the suit in respect of the second item also. The finding with regard to the second item of suit property is not in order and the same is liable to be set aside. Hence, the point is answered against the plaintiff.

11. Point No.2 :

Even according to the plaintiff, the second and third defendants are not the co-owners of the suit property. The second defendant claims right over the suit property independently in pursuance of the disputed Will dated 3.12.74 which is marked as Ex.B2. The second and third defendants are not claiming right over the suit property as co-owners along with the plaintiff. It is also not the case of the plaintiff and the first defendant that they are claiming right in respect of the suit property along with the second and third defendants under co-ownership. Therefore, I am constrained to hold that the second and third defendants are not, co-owners of the suit property.

12. It is specifically alleged by the second defendant that he has independent right over the suit property in pursuance of the Will dated 3.12.74. It is also his case that he has taken possession of the item No.1 and 3 of the suit property in pursuance of the said Will. He further stated that he sold the first item of suit property to third parties and the same is not available for settlement of issues. He further stated that the names in the revenue records with regard to third item of property transferred in his name as he is in possession of the said property. He further stated that he has been paying property tax in respect of third item of property in his name. The second defendant in his written statement specifically alleges that right over the suit property i.e. first and third item of property has not vested with the plaintiff in pursuance of the Will dated 3.12.74 since the second and third defendants are not co-owners of the suit property and that they claim right over the suit property in their own way in pursuance of Will dated 3.12.74. In such contingency the plaintiff ought to have amended the suit relief for declaration of title to the suit property. But, the case of the plaintiff is only for partition of suit property. The second defendant further alleges that the first item of property not available for partition and the same was sold to the third parties. Further, the

Will dated 11.12.67 which is marked as Ex.B1 (Ex.A1) was not related to third item of property. There was no reference with regard to third item of property in the Will dated 11.12.67. Thus, no clarification offered by the plaintiff in the plaint. In such view of the fact suit for partition against second and third defendant also is not in accordance with facts on hand and therefore the plaintiff cannot sustain the suit against the second and third defendants for partition of suit property. The lower Court has not considered this point in detail and also without any authority holding that the plaintiff is entitled for partition over the suit property against the second and third defendants and therefore the same is liable to be set aside and accordingly set aside. Hence, the point is answered in favour of the defendants 2 and 3.

13. Point No. 3 :

It is true that late Palaniammal executed the Will dated 11.12.67 in favour of Kaliammal and Rangammal in respect of the suit property viz., first and second item of the suit property. The Will (Original) is marked as Ex.A1. There is no dispute regarding this fact. Even the second defendant in his written statement admitted the genuineness of Ex.A1. The said Will is registered one. Therefore, the contention of the plaintiff that late Palaniammal executed the Will dated 11.12.67 in favour of Kaliammal and Rangammal in respect of the properties referred therein is sustainable and hence this point is answered in favour of the plaintiff.

14. Point No.4 :

It is the case of the second defendant that late Palaniammal executed a Will dated 3.12.74 in respect of the property referred therein in his favour cancelling the first Will dated 11.12.67 in favour of Kaliammal and Rangammal. The second defendant has filed a registered copy of the Will to prove his case. However, original Will not filed by the second defendant to sustain his claim.

15. It is the specific case of the first defendant that the alleged Will dated 3.12.74 was not executed by Palaniammal during the relevant point of time as she was incapable of executing any Will. In fact, the said Palaniammal was unwell and bedridden from the year 1973 onwards. She was not mentally fit and she was not in a condition to execute any registered document. It is further submitted that the alleged Will dated 3.12.74 is a forged and fabricated document brought by impersonation. In view of the rival contention, it is apparent that the said Will has to be proved under law as genuine as the case of the second defendant is based on the same. Admittedly, the original Will is not before the court to find out whether the testator had really executed the alleged Will. The registration copy of document alone is filed which is marked as Ex.B2. The attesor of the said Will was examined by the second defendant to prove the genuineness of the Will. The said attesor who was examined as a witness has not spoken anything about the testator's

signature. He also not stated that the testator put his signature only in his presence. With the above backdrop, the second defendant has to prove the genuineness of Will by some modes.

16. The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Sec.63 Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Where a party alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy, the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts, by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant a relief, even if the will might be unnatural and might cut off wholly or in part near relations. The party relying on Will must prove that the signature of the executant of the document is of his own atleast by examining one testator witness.

17. In this case, the original Will was not subjected to scrutiny. Therefore, the signature of the executant is not available to prove that the signature of the executant of the document is of his own. Without production of this original will, the concept of genuineness of the same cannot be proved. So, the examination of the attesting witness is meaningless. Therefore, the examination of attesting witness on the side of the second defendant has no bearing for the settlement of the issue.

18. According to the second defendant, the original will dated 11.12.67 in favour of Kaliammal and Rangammal was cancelled by late Palaniammal through the disputed will dated 3.12.74. Admittedly, Kaliammal and Rangammal are the class I legal heirs of late Palaniammal. The second defendant is not class I heir of late Palaniammal. In fact Palaniammal bequeathed her right in respect of the properties referred in the Will dated 11.12.67 in favour of Kaliammal and Rangammal who are her daughters. If, that be so, the alleged will dt.3.12.74 is genuine, the

executant ought to have stated the reasons for not bequeathing the right over the properties referred in the said will in favour of her legal heirs while bequeathing the same in favour of the second defendant who is not a class I legal heir. In fact, the second defendant is none other than the brother's son of late Palaniammal's husband. Since the first will dt.11.12.67 is registered one, executant of the disputed will ought to have given reasons for not bequeathing the right over the properties referred therein in favour of her legal heirs while cancelling the registered will dated 11.12.67 bequeathing her right in respect of the properties referred therein in favour of her legitimate legal heirs. The absence of such recital in the disputed will creates a doubt. Even according to the plaintiff the said testator was not in good health from the year 1973 onwards. This aspect was not disputed by the second defendant. It is admitted that the testator died within 40 days from the date of execution of the disputed will. The death of Palaniammal was due to prolonged ailment. This is also one of the suspicious circumstances to doubt the genuineness of the will. The principle laid down in the cases of

(1) Shashi Kumar Banerjee and Subodh Kumar Banerjee reported in AIR 1964 Supreme Court 529
(2) 2007 AIR SCW 203 in the case of Niranjana Umeshchandra Joshi and Mrudula Jyoti Rao,
(3) 2002 (4) ALT 426 (D.B.) in the case of Gondrala Sithamahalakshmi and Pulipati Rajarao
would vouch my opinion expressed with reference to the mode of proving the Will.

19. From the above discussion, I am satisfied that the Will dated 3.12.74 has no legal sanction to sustain the claim of the second defendant. Hence, I answered the point against the second defendant.

20. Point No.5 :

In view of the finding rendered in point No.1, I am constrained to hold that the plaintiff is not entitled for partition in respect of the second item of the suit property. Therefore, finding of the lower court in this regard is set aside and the suit in respect of the item No.2 of the suit property is dismissed. Hence, this point is answered accordingly.

21. Point No.6 :

It is the specific case of the plaintiff and the first defendant that the first item of the suit property is in their joint possession. It is also the specific case of the first defendant that the third item of suit property is in his physical possession. Whereas the second and third defendant submitted that the first item of the suit property is not available for partition and the same was already sold to third parties. The written pleadings reads as follows:

"The second defendant who was in possession and enjoyment of the properties had partitioned the item No.1 of the suit property on 11.12.81 with his sons and sold away the same and it is in the hands of the

third parties."

This specific assertive statement was not confirmed by the plaintiff. In such view of the fact, it is apparent that the first item of the suit property is not available for partition as the same is in the hands of third parties. Such assertion would imply that the first item of suit property is not in possession of either with the plaintiff or with the first defendant.

22. The first defendant relied on Ex.B6 and B7 to prove that the third item of property is in his possession whereas the second defendant relied on Ex.B4 to prove that the third item of property is in his possession. He has also stated that the revenue records in respect of third item of property transferred in his name. Moreover, the plaintiff claims his right in respect of third item of suit property basing on the Will dated 11.12.67 which is marked as Ex.B1 (Original). On a perusal of the Will, I do not find any recital with reference to the third item of property. The learned counsel for the appellant submitted that though there is no reference to third item of suit property in the said Will, the third item of property is very much available for partition in view of the admission of the second defendant with regard to the third item of suit property in the name of Palaniammal. Since the second defendant is not a co-sharer of the suit property along with the plaintiff and the first defendant. Even if he admits the title to the third item of suit property in favour of Palaniammal, the plaintiff cannot ask for a share of the same by means of partition suit. Ex.B6 voter list and Ex.B7 Ration card are related to the house No.54, Subbukonar street and not related to the suit property which is concerned to 39, Subbukonar street. Hence, these documents would not vouch that the first defendant is in possession of third item of suit property. Admittedly, the revenue records, in respect of third item of suit property, transferred in the name of the second defendant. In such view of the fact, I am satisfied that the third item of property is in possession of the second defendant and not with the first defendant. Hence, I answered this point in favour of the second defendant.

23. Point No.7, 8 & 9 :

In view of the finding rendered in point No.6, these points are answered in favour of the second defendant.

24. Point No.10 :

In view of the finding rendered specifically with reference to the point No.2 in favour of the second and third defendants, the finding of the lower court in decreeing the suit in favour of the plaintiff is not in order. In such view of the fact, the finding of the lower court is liable to be set aside and accordingly, it is set aside. Hence, this point is answered against the plaintiff.

In result, appeal is allowed. The judgment and decree of the lower court in O.S. No.230 of 1987 on the file of Second Additional Subordinate Judge, Coimbatore in decreeing the suit claim is set aside. The suit is dismissed. However, the parties have to bear their respective costs.

vaan

Sd/- Asst.Registrar
Dt/-27.3.2007

***Power of Attorney's name incorporated
as per the order of the Deputy Registrar[Judicial]
dated 26.7.2007**

Sd/-Asst. Registrar,
Dt/-6.8.2007.

/true copy/

Sub Asst.Registrar

To

1. The Second Additional]
Subordinate Judge,]
Coimbatore.]
2. The Section Officer,]
VR Section, High Court,]
Madras.]
+ 1 cc to Mr. R. Saseetharan,]
Advocate SR No. 7974]
+ 1 cc to Mr. V. Raghavachari,]
Advocate SR No. 7875]

To be substituted to the order
already despatched on 16.4.2001.

TEJ(CO)
SR/30.3.2007
gp/7.8.2007

A.S.No.469 of 1992
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