

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 30-09-2016

Pronounced on: 26-10-2016

Coram:

The Hon'ble Mr. Justice A.SELVAM

and

The Hon'ble Mr. Justice P.KALAIYARASAN

O.S.A.Nos.188 and 189 of 2004

In O.S.A.No.188 of 2004:

1. Tmt. M. Rajeswari
2. Selvi M. Sivakami
3. Selvi M. Jagadeeswari .. Appellants

Vs.

1. M. Ganesan
2. M. Ponnambalam(deceased)
3. M. Gopalasundaram
4. Sashikala
5. P. Kanchan Kumar .. Respondents

RR4 & 5 brought on record as LRs of deceased R2 vide order of Court dated 09-03-2012 made in C.M.P.No.1137 of 2011.

In O.S.A.No.189 of 2004:

1. Rajeswari alias Sundarammal
2. M. Sivakami
3. M. Jagadeeswari .. Appellants

Vs.

1. M. Ponnambalam (deceased)
2. Parvatha Rajakumari
3. M. Palani
4. M. Ganesan
5. M. Gopalasundaram
6. M. Thanikai Aresu
7. Sashikala
8. P. Kanchan Kumar .. Respondents

RR7 & 8 brought on record as LRs of deceased R1 vide order of Court dated 09-03-2012 made in C.M.P.No.1138 of 2011.

Original Side Appeals preferred under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of Letters Patent against the order of this Court dated 09-04-2001 made in T.O.S.No.13 of 1998(Op. 536 of 1995) and Transfer C.S.No.159 of 2000 (C.S.No.343 of 1995) on the file of this Court.(Tos 13 of 1998 (OP.No.536 of 1995) suit praying grant letters of Administration of will annexed, to the petitioners as beneficiaries under the will of the deceased having effect throughout the state of Tamil Nadu.

TR.C.S. No.159 of 2000 (CS.No.343/1995)

Suit praying to pass Judgment and decree against the defendants:

(a) for partition and separate possession of the plaintiff's 1/9th share in the joint family properties, more fully described in schedule A B and C

(b) directing defendants 1 and 6 to 8 to render accounts in respect of the A schedule property.

(c) direct the defendants 1 and 6 to 8 to pay to the plaintiff the mesne profits and future mesne profits from the schedule A mentioned property.

(d) granting a permanent injunction restraining the defendants from in any manner interfering with the plaintiff's peaceful possession and occupation of the entire second floor of the A schedule property.

For Appellants : Mr. R. Thiyagarajan, Senior Counsel
in both OSA's for Mr. V. G. Suresh Kumar

For Respondents : Mr. G. Kalyan for
M/s. Surana and Surana
for RR4 and 5 in O.S.A.No.188 of 2004
for RR7 and 8 in O.S.A.No.189 of 2004

(No appearance for RR1 and 3 in O.S.A.No.188 of 2004 and for RR2 to 6 in O.S.A.No.189 of 2004)

JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED BY A.SELVAM, J.)

These Original Side Appeals have been preferred against the common judgment passed in T.O.S.No.13 of 1998 and Transfer C.S.No.159 of 2000 by the learned Single Judge of this Court.

2. Pending appeal, a memo dated 30-09-2016, has been filed by the appellants stating that the first appellant in both the appeals, Smt. Rajeswari W/o.Murugesha Nadar died pending appeals on 14-02-2014 and her legal representatives, (who are none other than remaining appellants and respondents), are already on record. The said memo is taken on record.

3. The appellants in both the appeals have filed T.O.S.No.13 of 1998 praying to grant letter of administration in respect of the Will dated 24-05-1994. The deceased second respondent in O.S.A.No.188 of 2004 and first respondent in O.S.A.No.189 of 2004, as plaintiff has instituted Transfer C.S.No.159 of 2000 for the relief of partition.

4. The material averments made in the plaint filed in T.O.S.No.13 of 1998 can be summarised as follows:

The first plaintiff is the wife of Murugesha Nadar. The plaintiffs 2 and 3 and defendants 1,3 to 6 are their children. The second defendant is a daughter-in-law of first plaintiff and the said Murugesha Nadar. The property mentioned in the Schedule is the absolute property of the said Murugesha Nadar and he voluntarily executed the Will dated 24-05-1994 in favour of the plaintiffs and he passed away on 29-10-1994. Under the said circumstances, the present suit has been instituted for the relief sought therein.

5. In the written statement filed on the side of the defendants 1,4 and 5, it is averred that the relationship mentioned in the plaint is correct. It is false to aver that the property mentioned in the Schedule is the absolute property of Murugesha Nadar and the same is nothing but a joint family property and he passed away on 29-10-1994 leaving behind him, the plaintiffs and defendants as his legal heirs. It is false to aver that he executed the Will mentioned in the plaint. The deceased Murugesha Nadar has got birth in the year 1910 and he passed away at the age of 84. He has been admitted in Government Hospital, Chennai in the month of June 1987 for cerebral hemorrhage due to hyper tension. He also suffered from severe paralytic attack and his right side body has become totally paralysed. Further, his brain has become badly affected. Till his death, he has not been able to speak. Under the said circumstances, the Will mentioned in the plaint is not genuine. At the most, each party is entitled to get one-ninth share in the property mentioned in the Schedule and there is no merit in the suit and the same deserves to be dismissed.

6. The material averments made in the plaint filed in Transfer C.S.No.159 of 2000 are as follows:

The first defendant is the wife of Murugesa Nadar. The property mentioned in the Schedule is the joint family property and the said Murugesa Nadar has passed away on 29-10-1994 leaving behind him the plaintiff and defendants as his legal heirs. Under the said circumstances, each sharer is entitled to get one-ninth share in the suit property. Since the defendants are not amenable for partition, the present suit has been instituted for the reliefs sought in the plaint.

7. In the written statement filed by the defendants 1, 6, 7 and 8, it is averred that the defendants Murugesa Nadar has passed away on 29-10-1994. It is false to aver that the suit property is the joint family property and the same is nothing but his self-acquired property and he bequeathed the same under a Will. The plaintiff is not having right of partition over the suit property and therefore, the present suit deserves to be dismissed.

8. On the basis of the rival pleadings raised on either side, the learned Single Judge has framed necessary issues and after analysing both the oral and documentary evidence has dismissed T.O.S.No.13 of 1998 and decreed Transfer C.S.No.159 of 2000 in part by way of passing the impugned common judgment and the same is being challenged in the present Original Side Appeals.

9. Since common questions of law and facts are involved in both the appeals common judgment is pronounced.

10. Before contemplating the rival submissions made on either side it has become indefeasible to narrate the following admitted facts:

It is an admitted fact that the plaintiffs in T.O.S.No.13 of 1998 are none other than the wife and daughters of the deceased Murugesa Nadar. Likewise, the defendants 1, 3 to 6 are his sons and the second defendant by name Parvatham Rajakumari is none other than the wife of his pre-deceased son.

11. The specific averments made in the plaint in T.O.S.No.13 of 1998 is that the property mentioned in the Schedule is the separate property of the deceased Murugesa Nadar whereas on the side of the contesting defendants as well as the plaintiff in Transfer C.S.No.159 of 2000, it has been specifically alleged to the effect that the property in question is a joint family property. But in Transfer C.S.No.159 of 2000, it has been specifically prayed to the effect that the plaintiff therein is entitled to get one-ninth share in the suit property. Therefore, it is needless to say that even on the side of the contesting defendants in T.O.S.No.13 of 1998, it

is clearly accepted to the effect that the property, in question is nothing but a self-acquired property of the deceased Murugesa Nadar.

12. As adverted to earlier, T.O.S.No.13 of 1998 has been instituted to grant letter of administration in respect of the Will dated 24-05-1994 alleged to have been executed by the testator viz., Murugesa Nadar, in favour of the plaintiffs therein. But the plaintiff in Transfer C.S.No.159 of 2000 has filed the same by way of saying that the said Murugesa Nadar has passed away intestate and therefore, each sharer is entitled to get one-ninth share in the suit property. Under the said circumstances, the following questions have become emerged for consideration:

1. Whether the deceased Murugesa Nadar has executed the Will dated 24-05-1994 in a sound and disposing state of mind in favour of the plaintiffs found in T.O.S.No.13 of 1998;
2. Whether the plaintiff in Transfer C.S.No.159 of 2000 is entitled to get a preliminary decree of partition in respect of his alleged one-ninth share in the suit property.

It has already been pointed out that the learned Single Judge after considering the divergent evidence available on record has declined to accept the prayer sought in T.O.S.No.13 of 1998 and ultimately dismissed the suit. The learned Single Judge has granted a preliminary decree of partition in respect of the suit 'A' Schedule property in Transfer C.S.No.159 of 2000.

13. The learned Senior Counsel appearing for the appellants has contended in extenso to the effect that the suit property is the absolute property of Murugesa Nadar. The first plaintiff in T.O.S.No.13 of 1998 is his wife and the plaintiffs 2 and 3 are his unmarried daughters and by way of considering the status of the plaintiffs, he voluntarily executed the Will dated 24-05-1994 and even though he attained the age of 84 at the time of execution of the said Will, he possessed sound and disposing state of mind and to that effect, one of his sons viz., D.W.1 has given his evidence and for the purpose of proving due execution and attestation of the Will dated 24-05-1994, on the side of the plaintiffs in T.O.S.No.13 of 1998 one of the attestors has been examined as P.W.3 and his specific evidence is that the testator viz., Murugesa Nadar has executed the Will in question and put his left thumb impression and subsequently, he and another attesting witness have put their signatures. But the learned Single Judge without considering the trust-worthy evidence adduced on the side of the plaintiffs in T.O.S.No.13 of 1998 has erroneously rejected the relief sought therein simply

on the ground that the retired District Judge who drafted the Will dated 24-05-1994 has not been examined. Under the said circumstances, the reasons given by the learned Single Judge for rejecting the relief sought in T.O.S.No.13 of 1998 are not proper and therefore, the common judgment passed by the learned Single Judge is liable to be set aside and T.O.S.No.13 of 1998 is liable to be decreed as prayed for and Transfer C.S.No.159 of 2000 is liable to be dismissed.

14. The learned counsel appearing for the contesting respondents has also equally contended to the effect that the deceased Murugesu Nadar has got birth in the year 1910 and before his demise he suffered from paralytic attack and his brain has become defective and till his demise, he has not been able to speak and for the purpose of proving his prolonged illness, replete evidence is available on the side of the defendants and further, on the side of the plaintiffs in T.O.S.No.13 of 1998 no replete evidence is available with regard to sound and disposing state of mind of the alleged testator and the learned Single Judge after considering both the physical and mental condition of the testator and also after considering non-examination of the retired District Judge, who is said to have drafted the Will, has rightly rejected the prayer sought in T.O.S.No.13 of 1998 and rightly decreed the suit filed in Transfer C.S.No.159 of 2000 and therefore, the judgment and decree passed by the learned Single Judge are not liable to be interfered with.

15. In order to buttress the contentions put forth on the side of the respondents, the following decisions are relied upon:

(i) In 1992 (2) MLJ 634 (Thankam alias Karthiyani Vs. C. Madhavan) the Division Bench of this Court has held as follows:

"If there are suspicious circumstances with regard to due execution and attestation of Will, then propounder is bound to remove all suspicion."

(ii) In 2011 (5) CTC 287 (N. Govindarajan Vs. N. Leelavathy and others) the Division Bench has culled out the following circumstances to describe as suspicious circumstance:

(1) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;

(2) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;

(3) Where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.

(iii) In AIR 1959 SC 443 (H. Venkatachala Iyengar Vs. B.N. Thimmajamma and others) it has been held that the Sub-Registrar in whose presence the document was registered on the same day has not been examined though he was alive at the date of the trial, creates bona fide suspicion about the execution of

Will.

16. With these legal as well as factual backdrops, the Court has to analyse the rival submissions made on either side.

The Will dated 24-05-1994 alleged to have been executed by the deceased Murugesu Nadar has been marked as Ex-P1 on the side of the plaintiff in T.O.S.No.13 of 1998. The specific defence taken on the side of the contesting defendants in T.O.S.No.13 of 1998 is that the testator viz., deceased Murugesu Nadar prior to his death has not possessed sound and disposing state of mind and for the past several years, he suffered from paralytic attack and right side of his body has become dysfunction and even his brain has become ineffective. Considering the nature of defence taken on the side of the contesting defendants in T.O.S.No.13 of 1998, the entire burden lies upon the plaintiffs therein to prove that Ex-P1 has been executed by the testator in a sound and disposing state of mind.

17. It is a well-known and also archaic principle of law that as per Section 63 of the Indian Evidence Act 1872, in a case of Will both due execution as well as attestation must be legally proved. Otherwise, the same cannot be taken as evidence.

18. On the side of the plaintiffs in T.O.S.No.13 of 1998 one of the plaintiffs by name Jagadeeswari has been examined as P.W.1. During the course of cross-examination, she candidly admitted to the effect that the testator has been given treatment for paralysis attack and cerebral hemorrhage. Further, she admitted to the effect that his right hand and right leg are affected by paralysis attack. From 1987, till his demise he has not been able to sign. Further, she stated that the Will in question has been drafted by a retired District Judge and his father has spoken to him and voice of his father has been recognized by the said retired District Judge.

19. On the side of the defendants in T.O.S.No.13 of 1998, one of the sons of the alleged testator by name Gopalasundaram has been examined as D.W.1 and his specific evidence is that his father has been admitted in Government Hospital, Chennai for one month. After one month, the Doctors told that his father has to be given prolonged treatment. At the time of discharge, his father has not been completely cured. Even though his father has regained conscious his right side body has been completely affected and he has not been able to speak and his eye sight has also become poor. Further, he would say in his evidence that he used to pass urine in bed.

20. From a cumulative reading of the evidence given by

P.W.1 and D.W.1, the Court can easily ken that the alleged testator at the time of his death is not only an Octogenarian but also a Valetudinarian. Further, he has not possessed sound and disposing state of mind. It has already been pointed out that as per Section 63 of the Indian Evidence Act, 1872, in a case of Will both execution as well as attestation should be legally proved. Therefore, it goes without saying that the word execution includes sound and disposing state of mind of the alleged testator.

21. Even though P.W.1 has stated in her evidence that a retired District Judge has met her father and he spoken to him and the said retired District Judge after hearing the voice of the testator, has drafted the Will dated 24-05-1994, for the reasons best known to the plaintiffs in T.O.S.No.13 of 1998, the said retired District Judge who is said to have drafted the Will has not been examined on the side of the plaintiffs and that itself shows that the plaintiffs have not discharged their initial burden that lies upon them.

22. It is true that one of the attestors of Ex-P1 by name Shankar has been examined as P.W.3. He would say in his evidence that after execution of Will, the testator has fixed his left thumb impression and subsequently, he and one Srinivasan have put their signatures as attesting witnesses. But his evidence is not at all sufficient for coming to a conclusion that the testator at the time of alleged execution of Ex-P1 has acted in a sound and disposing state of mind. Further, P.W.3 has had no connection whatsoever with the family of the testator, and he is a job-typist by profession. Under the said circumstances, the evidence given by him cannot be a basis for coming to a conclusion that the due execution as well as attestation of Ex-P1 have been clearly established on the side of the plaintiffs in T.O.S.No.13 of 1998. Except the aforesaid rickety and fragile evidence adduced on the side of the plaintiffs, no other piece of evidence is available for the purpose of coming to a conclusion that Ex-P1 has been duly executed by the alleged testator in a sound and disposing state of mind. Further, even for the purpose of knowing both the physical and mental condition of the alleged testator, the concerned Registrar has not been examined on the side of the plaintiffs. Therefore, viewing from any angle, the contentions put forth on the side of the plaintiffs in T.O.S.No.13 of 1998 cannot be accepted.

23. It has already been pointed out that Transfer C.S.No.159 of 2000 has been instituted for the relief of partition. Further, it has already been pointed out that the suit property is nothing but self-acquired property of the

deceased Murugesha Nadar. Since the Will (Ex-P1) alleged to have been executed by him has not been duly and legally proved on the side of the plaintiffs in T.O.S.No.13 of 1998, the Court can easily come to a conclusion that the said Murugesha Nadar has passed away intestate. It is an admitted fact that the plaintiff and defendants in Transfer C.S.No.159 of 2000 are the legal heirs of the deceased Murugesha Nadar and as per Section 8 of the Indian Hindu Succession Act, 1956, the plaintiffs and the defendants are having partible interest in the suit property. Therefore, it is quite clear that the plaintiff is having one-ninth share in the suit property. The learned Single Judge after considering the overall evidence available on record has rightly dismissed T.O.S.No.13 of 1998 and decreed Transfer C.S.No.159 of 2000.

24. In view of the discussion made earlier, this Court has not found any acceptable force in the contentions put forth on the side of the appellants and altogether, these Original Side Appeals are liable to be dismissed.

In fine, these appeals are dismissed without costs. The common judgment passed in T.O.S.No.13 of 1998 and Transfer C.S.No.159 of 2000 by the learned Single Judge of this Court is confirmed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To
The Sub Asst. Registrar,
Original Side,
High Court, Madras

+1cc to Mr.Surana & Surana, Advocate, S.R.No.61623
+2cc to Mr.V.G. Sureshkumar, Advocate, S.R.No.61443 & 61444

sai (CO)
md (9/11/2016)

O.S.A.Nos.188 and 189 of 2004