

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on: 19.01.2017

Judgment pronounced on: 24.01.2017

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1441 of 1999

1. Muthulakshmi Ammal
2. Dhanakodi Ammal
3. Sembayee Ammal ... Appellants/Respondents/Plaintiffs

Vs.

1. Amurdhalinga Padayachi (Deceased)
2. Murugan
3. Muthayee Ammal
4. Chinnammal
5. Ayya Durai Padayachi
6. Rajavelu
7. Kandasamy ...2 to 7th respondents/2 to 7th
Appellants/2 to 7th Defendants
8. A.Kalaimani
9. Dharma @ Dharmalingam
10.A.Sabapathy
11.Sivakamasundari ... Respondents
(RR8 to 11 brought on record as legal heirs
of deceased first respondent vide order of
court dated 05.06.2014 made in CMP.No.1169
of 2011 in S.A.No.1441 of 1999)

... Respondents

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 10.07.1997 in A.S.No.194 of 1993 on the file of the Additional District and Sessions Judge, South Arcot Vallalar District, Cuddalore partly reversing the judgment and decree dated 26.02.1993 in O.S.No.578 of 1986 on the file of the District Musnif's Court, Panruti.

For Appellant : Ms.R.Meenal

For RR2,5 and 6 to 10 : Mr.R.Gururaj

For RR3, 4 and 11 : No appearance
R1 : Died

JUDGMENT

The plaintiffs are the appellants herein for a suit for partition seeking share in the property of one Appulinga Padayachi, which was inherited by his sons Uthaandi Padayachi and Amurdhalinga Padayachi. According to the plaintiffs, Uthaandi Padayachi died intestate leaving behind his wife-first plaintiff and two children who are 2nd and 3rd plaintiffs in the suit. After the demise of Uthaandi Padayachi, Appulinga Padayachi and his son Amurdhalinga Padayachi were enjoying the suit property as a joint family property till the death of Appulinga Padayachi. The defendants 1,3 and 4 are the legal heirs of Appulinga Padayachi. When the plaintiffs sought for a share in the joint family property, it was refused by the first defendant. Hence, the present suit for partition seeking 5/12 share to the plaintiffs 1 to 3 in the suit schedule property.

2. Defendants 2,5, and 6 have purchased suit items 3,5,6 and 7 pending suit and therefore they are also impleaded as party-respondent. The suit was contested by the defendants 1 and 2 on the ground that the suit properties are not joint family property and it was not enjoyed in common by the joint family as alleged by the plaintiff. Appulinga Padayachi and his sons were never enjoying the property jointly. Infact, Uthaandi Padayachi died in the year 1968 before the death of his father Appulinga Padayachi, who died an year later in 1969. Amurdhalinga Padayachi and Uthaandi Padayachi alongwith their father Appulinga Padayachi never lived together as alleged by the plaintiff during their life time. Immediately after his marriage, Uthaandi Padayachi left the family and settled in his in-law's village and on the death of Uthaandi Padayachi, the plaintiffs shifted their family. Therefore, at no point of time, the plaintiffs and the first defendant were living as a joint family and the suit properties were never enjoyed as joint family property. The suit properties were all purchased by Appulinga Padayachi in his name out of his own income. During his life time, Appulinga Padayachi executed a will in favour of the first defendant's son Jambulingam Padayachi. As the guardian of the minor Jambulingam Padayachi, the first defendant was maintaining the property and after the death of Jambulingam Padayachi, the property has reverted to the first defendant absolutely. The first defendant being in enjoyment of suit property for considerable period of time, he has perfected the title by adverse possession and in so far as the second item of the suit property, the second defendant purchased it from Appulingam Padayachi and enjoyed the property. The other defendants 5 and 6 in their written statement has contended that

in S.No.412/9, out of 2.05 acres, the fifth defendant has purchased 31 cents and sixth defendant has purchased 21 cents and in S.No.412/8, the 6th defendant has purchased 31 cents. Therefore, the plaintiffs have no right over these properties.

3. In the additional written statement, the first defendant has contended that Uthaandi Padayachi apart from second and third plaintiff had another daughter by name Kuppammal, who died in the year 1979 after her marriage. She is one of the legal heir of Uthaandi Padayachi and on her death, her husband will inherit the property which liable to get devolve upon Kuppammal, daughter of Uthaandi Padayachi. Regarding the first and second item property, the first defendant has contended that they are not property of Appulinga Padayachi. Kandasamy, who is the husband of Kuppammal has been impleaded as seventh defendant in the suit, who has filed a written statement in support of the defendants pleading that the suit properties are self-acquired property of Appulinga Padayachi and he has executed a will. Therefore, the plaintiffs are not entitled for any share in the suit property. In response to the written statement and additional written statements, the plaintiff has filed a reply statement questioning the Will of Appulinga Padayachi alleged to have been executed in favour of Jambulingam Padayachi, son of Amurdhalinga Padayachi. In the additional written statement of the first defendant, it was contended that on 11.03.1969, the plaintiffs issued lawyer notice contending that the family property was divided in the year 1965 and has included the suit schedule property as property allotted to Uthaandi Padayachi. Whiles, there cannot be another suit for partition. The additional written statement filed by the first defendant has been adopted by the other defendants namely 2, 5 and 6.

4. Based on the pleadings, the Trial Court framed as many as 12 issues, examined 2 witnesses on behalf of the plaintiff, 5 witnesses on behalf of the defendants and marked 11 exhibits under 'A' series and 19 exhibits under 'B' series.

5. The Trial Court held that there was no partition effected in the year 1965 and the alleged Will of Appulinga Padayachi in favour of Jambulinga Padayachi and marked as Ex.B14 is not genuine. So holding that the suit properties Item 1, 7 and 2 cents in Item 2 are joint family properties consisting of Appulinga Padayachi, Uthaandi Padayachi and Amurdhalinga Padayachi held that the plaintiffs are entitled for 5/12 shares. Whereas, regarding Item 3 to 6, the Trial Court has held that the properties are the self-acquired property of Appulinga

Padayachi and the plaintiffs entitled for $\frac{1}{4}$ shares in those properties, since the alleged Will-Ex.B14 alleged to have been executed by Appulinga Padayachi found to be executed under suspicious circumstances. Regarding the alienation in respect of properties in Item No.4,5 and 6, the Trial Court has held that such alienation will not bind the plaintiffs and the subsequent purchasers who are defendants 5 and 6 has to workout their remedy in the final decree proceedings to ensure that the property purchased by them are allotted to their vendor.

6. Aggrieved by the findings of the Trial Court, the plaintiffs 1,5 and 6 preferred First Appeal and on re-appreciation of the evidence, the First Appellate Court held that the findings of the Trial Court regarding the genuineness of Will marked as Ex.B14 is erroneous and it should not have arrived to the said conclusion based on the comparison of signature in his naked eye. Believing the evidence let in by the first defendant in support of the Will-Ex.B14, the First Appellate Court held that through DW2,3 and 4, the defendant has proved the Will-Ex.B14 and the fact that, Appulinga Padayachi has purchased Item 3,4 and 5 of the suit property through Exhibits 5 to 7 through his own earning and they are all self-acquired property of Appulinga Padayachi, who in turn has settled those properties in favour of his grandson Jambulinga Padayachi through Ex.B14. Therefore, the plaintiffs are not entitled for share in Item 3 to 6 of the suit property. In so far as Item 1,7 and 2 cents in Item 2, the first respondent has conceded the right of the plaintiffs and therefore except those items were the plaintiffs are entitled for 5/12 shares, the claim of the plaintiff in respect of rest of the suit properties being rejected and to that extent, the Trial Court judgment has been reversed. Aggrieved by the judgment of the First Appellate Court, the present Second Appeal has been preferred by the plaintiffs.

7. At the time of admission, this Court has formulated the following substantial questions of law:

- (1) Whether in law, the lower appellate court is right in over looking that Ex.B14-Will was not proved as contemplated under Section 68 and 69 of the Evidence Act read with Section 63 of India Succession Act?
- (2) Whether in law, the Courts below are not wrong in ignoring the presumption that once a joint family nucleus is admitted, it is for the defendants to prove that this

nucleus was not adequate to cover the subsequent purchases?

8. The learned counsel for the appellant submitted that the suit properties being the joint family property in entirety and in the absence of evidence to show that Appulinga Padyachi purchased Items 3 to 6 from and out of his personal earning, the Courts below ought not to have held that Items 3 to 6 are self-acquired property of Appulinga Padayachi. The counsel for the appellant strongly emphasized that there cannot be two set of properties in a Hindu Joint Family when there is no evidence or pleadings to show that one of the member of the joint family had adequate independent source of income to accumulate wealth in his name and that wealth not being blended with the hotchpotch of the joint family. While the joint family already being the nucleus source for the family in accumulating ought to be presumed as property purchased from and out of joint family nucleus. It was further contended that when there is a patent discrepancy in the admitted signature and the disputed signature of Appulinga Padayachi, there is no wrong in the finding of the Trial Court holding that Ex.B14 is a manipulated document created in suspicious circumstances and there is no statutory bar on the Judicial Officer to compare the disputed signature with admitted signature in his naked eye. Infact Section 73 of the Indian Evidence Act presumes the Judicial Officer to do so without vesting to referring the document for an expert to give his opinion.

9. Per contra, the counsel for the respondents submitted that all the suit properties are not joint family properties. The plaintiffs, who are legal heirs of Uthaandi Padayachi, immediately after the death of Uthaandi Padayachi claimed right over the properties alleging that the suit schedule properties were allotted to Uthaandi Padayachi in the oral partition held in the year 1965. In their legal notice marked as Ex.B8 dated 11.03.1969, the plaintiffs pleaded oral partition and contrary to that issue another notice on 22.04.1981 marked as Ex.B11 contending that the suit properties are joint family properties. The plaintiffs have taken inconsistent plea regarding the nature of the property and therefore they are entitled for any share in the suit property.

10. In so far as the genuineness of the will marked as Ex.B14, the counsel for the respondent contended that it is a registered document executed in the presence of Registrar, the same has been spoken by Dws 2 to 4. The evidence of these witnesses has not been impeached in any manner by the plaintiffs. The defendants through these witnesses, who are

scribe and attestators of the Will have established the factum of execution of the Will by Appulinga Padayachi voluntarily and registration of this Will in the manner known to law. Since the defendant has proved the execution of the Will as per Section 68 and 69 of the Indian Evidence Act, the plaintiffs are not entitled for any share in those properties.

11. The Learned Counsel for the appellant while contending that suit properties are joint family property emphasized that even assuming Appulinga Padayachi has executed a Will in favour of first defendant's son Jambulinga Padayachi, it will not bind the other sharers since Appulinga Padayachi has no absolute right over the suit properties. In support of this submission, the counsel relied upon the judgment of the Honourable Supreme Court in Valliammai Achi Vs. Nagappa Chettiar and another reported in AIR 1967 Supreme Court 1153. The relevant portion of the judgment is extracted hereunder:

"But even assuming that there was some kind of election by Pallaniappa we cannot see how the nature of the property left by Pallaniappa's father would change merely because Pallaniappa's father made a will giving the residue absolutely to Pallaniappa and Pallaniappa took out probate of the will. The property being joint family property Pallaniappa's father was not entitled to will it away and his making a will would make no difference to the nature of the property when it came into the hands of Pallaniappa. A father cannot turn joint family property into absolute property of his son by merely making a will thus depriving sons of the son who might be born thereafter of their right in the joint family property. It is well settled that the share which a co-sharer obtains on partition of ancestral property is ancestral property as regards his male issues. They take an interest in it by birth whether they are in existence at the time of partition or are born subsequently: [see Hindu Law by Mulla, Thirteenth Edition, p.249, para 223(2)(4)]. If that is so and the character of the ancestral property does not change so far as sons are concerned even after partition, we fail to see how that character can change merely because the father makes a will by which he gives the residue of the joint family property (after making certain bequests) to the son. A father in Mitakshara family has a very

limited right to make a will and Pallaniappa's father could not make the will disposing of the entire joint family property, though he gave the residue to his son."

12.To counter the submission of the appellant, the respondent contended that Ex.B14 being a registered document and proved through the attested witnesses has mandated under Section 68 and 69 of the Indian evidence Act, the First Appellant Court has rightly reversed the erroneous finding of the Trial Court regarding the genuineness of the registered Will and in support of his submissions, he relied upon a judgment in Irudayammal Vs. Salayath Mary reported in [1972] 2 MLJ 50. The relevant portion of the judgment is extracted hereunder:

"There is general presumption about the execution of the Will arising under Section 60 of the Indian Registration Act (vide:Mulla's Indian Registration Act, Seventh Edition, Page 1256). It is true that registration, by itself in all cases, is not proof of execution, but if no other evidence is available, the (Certificate of registration is prima facie evidence of its execution and the certificate of the registration officer under section 60 of the Registration Act is relevant for proving execution. (See discussion in Sarkar's Evidence, Lates (12th) Edition, Page 640). As observed by the Privy Council in Mohammed Ihtishal Ali V. Jamna Prasad L, registration is a solemn act and if no other evidence is available, the Court can presume that the Registrar performed his duty of satisfying himself that the document presented to him for registration was duly executed by the executant and the executant was duly and properly identified before him. The same view has taken in Gopal Das V. Sri Thakurji², in which, after referring to the earlier decision of the Privy Council in Mohamed Ihtishan Ali v.Jamna Prasad¹, Sir George Rankin observed that the evidence of due Registration is itself some evidence of execution as against the other side. There is a full discussion on this question as to the presumption arising from the fact of due registration, coupled with the presumption arising under section 114 of the Indian Evidence Act, in a Bench decision of the Mysore High Court in Huchegowda v. Chennigegowda³, in which it was held that the evidence that a document was duly registered in some evidence of its

execution by the person by whom it purports to have been executed. There is a full discussion of the relevant case law including the decision of the Privy Council in Mohammed Ihtishan Ali v. Jamna Prasad¹, aforesaid. In Revanna v. Dr.A.V.Ranga Rao⁴, it was observed that in cases where it is impossible for any person to prove execution of a document on account of the death of all the persons concerned, the best and the only possible evidence that may be available is that of a certified copy of the registered document and that in such cases, a presumption would arise under section 60 of the Registration Act along with Section 114 of the Evidence Act (see also Kashibai v. Vinayak⁵). It will be seen that in the ultimate analysis, the problem in each case is, 'has the best evidence been adduced on the facts of each case.'

13.Quoting the above judgment the respondent counsel emphasizes that the factum of Will was not introduced for the first time in the written statement, but the plaintiffs were made known about the execution of the registered will as early as 17.03.1969 in the reply notice sent to the plaintiffs which is marked as Ex.B9. After the receipt of the reply notice, the plaintiffs never chose to question the registered Will till 21.03.1986, the date on which the suit was filed. Therefore, having been proved the Will-Ex.B14 in the manner known to law, the plaintiffs have no right to claim share covered under the Will.

14.Further the learned counsel for the respondent also relied upon a judgment in Meenakshiammal (Dead) through LRs and Others V. Chandrasekaran & another 2005 2 L.W. 731. The relevant portion of the judgment is extracted hereunder:

"21.....

9.It is well-settled that one who propounds a Will must establish the competence of the testator to make the Will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will in the manner contemplated by law. The contestant opposing the Will may bring material on record meeting such prima facie case in which event the onus would shift the back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of

the Will and in sound disposing capacity executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

15. After careful consideration of the rival submissions made by the counsel for the respective parties as well as the judgments cited by them, this Court finds that the Trial Court erred in disbelieving a duly executed and registered document without any sufficient cause. The manner in which the admitted signature being compared with the disputed signature by the naked eye does not appear to be done properly. No doubt, neither the plaintiffs nor the defendants have sought for an opinion of the handwriting expert regarding the disputed signature. Just because a word is missed in the signature cannot be a reason to disbelieve the signature in toto. An old man, less educated while signing in an unusual atmosphere like Registration Office may be bound to omit a letter while signing. That cannot be a strong suspicious circumstance to disbelieve the signature while other patterns of signature are identical with the admitted signature. Moreover, when the document is a duly registered document and being spoken by the scribe and attester.

16. Factually in this case, while the plaintiffs have pleaded that the entire suit property is a joint family property and the plaintiffs are entitled for share in it, both the Courts below have held Items 3 to 6 are self-acquired property of Appulinga Padayachi. In respect of Items 1, 2 and 7, the Trial Court has held that plaintiffs are entitled for 5/12 share in it. The defendants have not preferred any appeal against the said findings. The First Appellate Court while modifying the decree of the Trial Court has confirmed the Trial Court decree in respect of Item 1, 7 and 2 cents in Item 2 of the suit property. The recitals found in Ex.B5 to B7 coupled with sale deeds in favour of Appulinga Padayachi in respect of Item 3 to 6 and the Will-Ex.B14 apart from other evidence categorically indicates that they are self-acquired properties of Appulinga Padayachi. When there is no evidence to show at the time of partition of those properties, there was joint family property

with adequate source to purchase, merely on presumption contra to documents, the Courts cannot voluntarily hold that the newly acquired properties are joint family properties.

17. For the aforesaid reasons, the substantial questions of law raised by the appellant deserves no merit in interfering the considered judgment of the First Appellate Court. In the result, the second appeal stands dismissed. There shall be no order as to costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1. The Additional District and Sessions Judge,
South Arcot Vallalar District,
Cuddalore.
2. The District Munsif,
Panruti.
3. The Section Officer,
VR Section, High Court, Madras.

+1cc to MS.R.Meenal, Advocate Sr.4615
+1cc to Mr.R.Gururaj, Advocate Sr.4747

सत्यमेव जयते

Second Appeal No.1441 of 1999

vg[col
srg 28/02/2017

WEB COPY