

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.03.2017

PRONOUNCED ON :17.03.2017

CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

A.S.No.893 of 2010 & M.P.No.1 of 2010

1. B.Subramani
2. B.Raman (Deceased)
3. B.Poongavanam
4. T.Elumalai ..Appellants 1 to 4/Plaintiffs 1 to 4
5. Radha
6. R.Parthiban
7. Rajesh
8. Miss.Suganti ..Appellants
(Appellants 5 to 8 brought on record as LRs of deceased second appellant vide Order of this Court dated 09.07.2014 made in C.M.P.No.1503 of 2014 in A.S.No.893 of 2010.

Vs.

1. Indirani
2. Santhi ... Respondents/Defendants

Appeal filed under Section 96 Code of Civil Procedure against the judgment and decree dated 13.08.2010 made in O.S.No.18 of 2008 on the file of the learned Additional District Judge, Fast Track Court - III, Tiruvallur and decree the suit as prayed by the appellants and divide the suit property into 30 equal shares and allot 7 shares each to the appellants by metes and bounds.

For Appellants : Mr.V.Chandra Kanthan

For Respondents : Mr.B.Gandhi

J U D G M E N T

Aggrieved over the judgment and decree of the learned Principal District Fast Track Court - III, Tiruvallur declining the partition in respect of the item Nos.11 to 13 of the suit schedule properties, the present appeal came to be filed by the plaintiffs in the suit.

2. During the pendency of the appeal, the second plaintiff, namely the second appellant died. His legal heirs were brought on record as appellants 5 to 8 as per the Order of this Court in CMP.No.1503 of 2014, dated 09.07.2004.

3. The parties are arrayed as per their ranking before the learned trial Court for the sake of convenience.

4. The brief facts of the plaintiffs case is as follows :

The plaintiffs and the defendants are sons and daughters of one Balarama Reddy. Item Nos. 1 to 10 and 14 and 15 described in the plaint schedule properties are ancestral properties of late Balarama Reddy. He was an agriculturist and out of the profits and the income derived from the ancestral properties, late Balarama Reddy purchased item Nos.11 to 13 by virtue of sale deeds dated 12.02.1962 and 05.04.1972 respectively. It is stated by the plaintiffs that the properties have been purchased in the name of the father out of the joint family income. It is also stated by the plaintiffs that the suit properties have not been cultivated for a long time and no income is derived from the properties and therefore, they have decided to sell away and that they approached the defendants being their sisters. They came to know that the defendants have created documents as though they were said to have been executed by the said Balarama Reddy. Therefore, the plaintiffs have issued a legal notice dated 22.12.2007 for partition wherein the defendants issued a reply dated 26.12.2007 with false allegations and also claimed that their father had executed a Will bequeathing Items Nos.11 to 13 of the suit properties in their favour. It is stated by the plaintiffs that the alleged Will is not proved and their father has never executed any Will in sound and disposing state of mind. It is also stated by the plaintiffs that their father had no right to execute the Will since the Item Nos.11 to 13 are ancestral joint family properties. Hence, prayed for a preliminary decree for dividing the suit properties into three equal shares and allot one such share to the plaintiffs.

5. Brief contentions of the defendants are as follows :

The defendants admitting the relationship submitted that their father has executed the Will in their favour in respect of survey Nos.47, 50 and 44 to an extent of 5.90 acres in Mylapore Village. They alone have taken care and welfare of their father during his life time. During his life time, he has registered a Will bequeathing the properties. Hence, the defendants alone are entitled to Item Nos.11 to 13. The plaintiffs have no right in respect of the properties bequeathed to them.

6. On the basis of the above pleadings, the following issues were framed:

1) Whether the suit Items 11 to 13 were purchased from out of income derived from the ancestral properties (item Nos. 1 to 10)?

2) Whether the Will dated 28.05.1997 is true and valid?

3) Whether the plaintiffs are entitled for partition as prayed for by them?

4) To what relief whether the plaintiffs entitled?

7. On the side of the plaintiffs, P.W.1 and P.W.2 were examined and Ex.A.1 to A.9 were marked. On the side of the defendants, D.W.1 to D.W.3 were examined and Ex.B.1 to B.7 were marked.

8. On the basis of the evidence adduced and documents marked, the learned trial Judge, taking into consideration of the death of the father of the parties and also taking into consideration of the mother of the parties is alive, granted preliminary decree in respect of Item Nos.1 to 10 and 14 and 15 and granting 4/21 share each to the plaintiffs and the defendants. However, dismissed the suit in respect of the item Nos.11 to 13, aggrieved over the same, the present appeal came to be filed.

9. The learned counsel for the appellants submitted that their father was an agriculturist and only out of the income derived from the ancestral properties, Item Nos.11 to 13 were purchased. The evidence available on record also clearly prove the same. It is the further contention of the learned counsel that the Will said to have been executed by the said Balarama Reddy, father of the plaintiffs and the defendants, in favour of the defendants is not proved in the manner known to law. Only the beneficiaries have taken active part in getting the Will registered in the registration office. D.W.3, one of the attesting witness also is the husband of the second defendant. His evidence clearly show that the Will has not been proved in the manner known to law. The execution and attestation of the Will has not been established. Hence, submitted that Ex.B.1 Will cannot be valid and admitted as an document in the eye of law. Hence, prayed for allowing the appeal.

10. The learned counsel appearing for the respondent submitted that the plaintiffs have not proved the existence of joint family nucleus. Merely joint family properties were available at the time of purchase of Items Nos.11 to 13 and that itself cannot be a ground to presume that the above properties are only purchased out of the joint family income. D.W.2, mother of the plaintiffs and the defendants, has clearly stated in her evidence that her husband was selling cow and also giving native treatment for fracture and out of the income earned by him in the above business, he has purchased the properties. The

evidence of D.W.2 clearly prove the fact that the properties purchased by her husband under Ex.B.2, Ex.B.3 and Ex.A.1 are only out of his own earnings. Hence, submitted that the plaintiffs have not established the joint family income. It is the further contention of the learned counsel that Ex.B.1 Will dated 28.05.1997 is executed by her husband bequeathing the properties in favour of their two daughters and the Will is a registered one. D.W.3, the son-in-law of the testator, has spoken about testamentary capacity and also the execution of the document by the testator. There is no suspicious circumstance, whatsoever, shrouded in the Will. It is also his submission that in the suit, the mother of the plaintiffs has not been impleaded. However, she has also died. Hence, submitted that the judgment of the learned trial Court is well balanced and does not require any interference.

11. In the light of the above submissions, now the points that arises for consideration are

1) Whether the item Nos.11 to 13 were purchased out of the joint family income of late Balarama Reddy?

2) Whether the Will dated 28.05.1997 is valid and true and proved before the Court of law?

12. Point No.1 :

The relationship between the parties are not in dispute. The plaintiffs and the defendants are brothers and sisters and they are sons and daughters of one Balarama Reddy. It is also not disputed by both sides that Item Nos.1 to 10 and 14 and 15 are the ancestral properties. It is specifically pleaded in the plaint that item Nos.11 to 13 have been purchased in the name of their father and those properties were purchased out of the income derived from the ancestral properties. Whereas, it is the contention of the defendants that their father executed a Will in respect of the item Nos.11 to 13 in their favour. Therefore, it is their contention that the plaintiffs cannot claim any share in view of the Will executed by their father. When the item Nos.1 to 10, being ancestral properties which is not disputed by the defendants in their written statement. Those items are more than 4.5 acres of agricultural property available to the family at the relevant point of time, besides, vacant site in item Nos.14 and 15, it is the specific case of the plaintiffs that only out of the income derived from these properties, item Nos.11 to 13, about 5.17 acres were purchased by their father. These properties were purchased by their father under Ex.A.1 sale deed dated 05.04.1973 for a sale consideration of Rs.1,540/-. Similarly under Ex.A.2 dated 12.02.1962 and Ex.A.3 dated 12.05.1962, for a total sale consideration of Rs.1000/- and Rs.200/- respectively. Though it is the contention of the defendants that their father was having a separate business and he was selling cows and also was giving native treatment for fracture, it is to be noted that these

facts are not even pleaded in the entire written statement, except a pleading that their father has bequeathed the property in their favour, nothing has been pleaded in the written statement about their father's individual income at the relevant point of time to purchase the said properties. Therefore, any amount of evidence adduced during the trial without pleading to that effect cannot be taken into consideration at all.

13. It is further to be noted that it is the specific case of the plaintiffs that the three properties namely 11 to 13 were purchased out of the joint family income and the income derived from the joint family properties by their father. The specific pleading in the plaint, not at all denied in the written statement. Specific fact alleged in the plaint as to the purchase of the properties out of the profits and income derived from the ancestral properties, not specifically denied in the entire written statement filed by the defendants, except bare denial in para No.2, there is no denial whatsoever made with regard to the specific allegation of the plaintiffs that these properties have been purchased out of the joint family income. In this regard, Order 8 Rule 5 of Code of Civil Procedure, when carefully read, the same reads as follows :

Specific denial - (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant shall be taken to be admitted except as against a person under disability;

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up on accordance with such judgment and such decree shall bear the date on which the judgment was pronounced."

14. From a reading of the above provision, it is very clear that when there is a specific allegation with regard to the facts, is not denied specifically or by necessary implications, the same shall be taken to be admitted, except as against the

person under disability. In entire written statement, the defendants have not even denied the character of the property, how it was purchased and income derived from the joint family properties. Further it is not even pleaded in the written statement with regard to the independent source of their father to purchase item Nos.11 to 13 of the suit properties. The question is whether the property has been purchased out of the independent income or from the income derived from the ancestral properties have to be decided on the facts and circumstances, of each case. Similarly, no doubt, the initial onus is on the persons who pleads that the properties were purchased from the joint family funds and they have to establish not only the existence of the undivided property but also the said joint family had sufficient means to purchase the properties. But in this case, the plaintiffs have clearly pleaded that their father had joint family properties, which has not been disputed by others. Similarly it is the specific pleadings of the plaintiffs that these properties are purchased out of the income derived from the ancestral property is also not denied in the written statement. Therefore, the initial onus on the plaintiffs has been discharged.

15. Now, it is for the defendants to establish that their father had sufficient funds by independent source to acquire the properties. Though it is the evidence of D.W.2, mother of the parties that the joint family properties are not fetching income and her husband was doing a business, selling cow and also he was giving native treatment for fracture, her evidence is not specific as to how long he was doing such business and what was the earning he derived from the above business. It is to be noted that the family had 4 ½ acres of joint family properties. The properties were purchased in the year 1962 and 1972 for a sum of Rs.1500/- and Rs.1300/- respectively. This income could have been easily fetched from the joint family properties at the relevant point of time. Item Nos.1 to 10 set out in the plaint clearly show that some of these properties are irrigation lands. Therefore, it cannot be said that there was no income at all from the joint family properties. In this case, the possession of the joint family properties has been established. Therefore, the defendants have to prove the independent income of their father to purchase the properties. Absolutely, there is no materials, whatsoever, available on record, except the evidence of D.W.1 and D.W.2. It is to be noted that without any pleading, any amount of oral evidence whatsoever, cannot be looked into. P.W.1 and P.W.2 in their evidence have stated that the properties were purchased from the income of the joint family properties. P.W.2 is a third party to the suit and neighbouring land owner. In his evidence, he has stated that he is holding lands in the village, he knew Balarama Reddy and he has purchased the properties in Item Nos.11 to 13 out of the income derived from the joint family properties. In his cross

examination, he has ascertained the same. His specific evidence is that the said Balarama Reddy was also rearing sheep and the sons were also contributing their hard work has not been denied.

16. Further, it is to be noted that D.W.1 in her chief examination, has not stated anything about their father's separate income to purchase the properties and in fact, she has stated that she is not aware of the same. Further, in her cross examination, she has stated that the above properties were purchased when she was only 2 ½ years old. Therefore, the alleged income earned by her father separately by doing business as spoken by D.W.1 in her cross examination is highly doubtful. D.W.1, mother of the parties, has also stated that her husband was giving native treatment to fracture and selling of cows and the income from the ancestral properties was not adequate to look after the family. Though D.W.2 has also stated in her cross examination that some documents have been obtained by the plaintiffs behind their back, in her cross examination, she has also stated that there is no dispute between the father of the plaintiffs and the plaintiffs. Therefore, her evidence cannot be given much importance, particularly when the pleadings of the defendants is silent about the source of independent income of their father and there is no denial with regard to the purchase of the properties from the income derived from their ancestral properties. Accordingly, this Court hold that the item Nos.11 to 13 is also purchased out of the income derived from the joint family ancestral properties. Accordingly, this point is answered.

17. Point No.2 :

It is the contention of the defendants that their father has left a Will dated 28.05.1997 and the Will has been marked as Ex.B.1. Ex.B.1 no doubt is a registered Will and attested by one Sekar and Anandan. Sekar is none other than the husband of the second defendant and son-in-law of the testator. The Will is a registered one and signed by the testator as well as the attesting witnesses. Under Ex.P.1, Item Nos.11 to 13 were bequeathed in favour of the defendants absolutely. The recitals of the Will also does not show that these properties were purchased out of the self earnings of the testator. The recitals of the Will show as if he has bequeathed the properties standing in his name. Be that as it may.

18. In this regard, D.W.1 when evidence carefully read, in her chief examination, she has stated that her father has executed the Will while he was in good health and sound state of mind. In the cross examination, it is the admission of D.W.1 that she had accompanied her father to the Registrar Office and another sister also came along with her husband at the time of registration of the Will. It is the specific admission of D.W.1

that at the time of registration of the Will, herself, her sister and her husband were present and her sister's husband Sekar signed as an attesting witness at that time and except him no other witness signed in the Will. From the evidence of D.W.1, it clearly shows that the other witness was not present to sign the document, except D.W.3 one Sekar. In this regard, evidence of D.W.2, when carefully read, she has admitted in her cross examination that she also went to the registration office along with her husband. At the time of executing the Will, their children were not aware of the Will. She has also admitted that she did not know when the Will was prepared and who were all present at the time of execution of the Will. The evidence of D.W.2 clearly shows that except, she and her husband, defendants are not present at the time of execution of the Will and she also did not know the other witness Whereas, D.W.1 in her evidence stated that she was also present and only D.W.3 alone signed in the Will as a witness.

19. The evidence of D.W.1 and D.W.2 with regard to the execution of the Will also is highly doubtful. Admittedly, the testator was living with the first defendant as per the evidence available on record. Her evidence clearly show that she has also participated and took prominent role in registering the Will. Where as, D.W.2 gave a different view that her daughters also do not know about the Will. These aspects create serious doubt in the manner in which the Will has been executed. This doubt is further fortified by the evidence of D.W.3, one of the attesting witnesses. In his chief examination, he had stated that he and another attesting witness signed in the Will after the testator put his signature in the Will and he was also in good state of mind at that time. In the chief examination, D.W.3 has not even mentioned about the name of the other attesting witness. His cross examination, when carefully perused, he has stated that since his father-in-law asked him to sign, he has put his signature. From the chief examination of D.W.3, when carefully read, his evidence proves only with regard to the alleged execution by the testator. Absolutely, there is no evidence available to prove the attestation as required under law.

20. It is well settled law that the attestation and execution are the two different acts one following the other. Only when the two acts, as required under section 63(c) of the Indian Succession Act and S.3 of the Transfer of Property Act are complied with, the Will can be said to be proved in the manner known to law. There can be no valid execution of a document which under the law is required to be attested without the proof of its due attestation aid if due attestation is also not proved. Mere execution of the document by the testator in

the alleged Will is of no avail. In this regard it is useful to refer to the judgment reported in 1995(6) SCC 213 (Kashibai Vs. Parwatibai), wherein it has been held that

"This brings us to the question of the Will alleged to have been executed by deceased Lachiram in favour of his grandson Purushottam, defendant 3. Section 68 of Evidence Act relates to the proof of execution of document required by law to be attested. Admittedly, a Deed of Will is one of such documents which necessarily require by law to be attested. Section 68 of the Evidence Act contemplates that 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. A reading of Section 63 will show that the 'attestation' and execution' are two different acts one following the other. There can be no valid execution of a document which under the law is required to be attested without the proof of its due attestation and if due attestation is also not proved, the fact of execution is of no avail. Section 63 of the Indian Succession Act, 1925 also lays down certain rules with regard to the execution of unprivileged Wills. Clause (c) of section 63 provides that the Will shall be attested by two or more witnesses, each one of whom has been the testator sign or affix his mark to the Will or has seen some other person sign the Will in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark or the signature of such other person; and each of the witnesses should sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary."

21. From the reading of the above judgment, it is very clear that if the attestation of the Will has not been proved, mere fact of execution is of no avail. In this case, D.W.3 has not spoken about the attestation and so also acknowledged the attestation in his presence. Merely because the Will has been registered, without proving the attestation, Ex.B.1 cannot be admitted in the evidence. S.63(c) of the Succession Act reads as follows :

"The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

22. From the above provision of law, it is very clear that both the execution as well as attestation to be proved, for the proof of the Will in accordance with law. Whereas, in this case, no evidence whatsoever is available on record to prove the attestation. Therefore, the execution or the signature of the testator alone will not be helpful to prove the Will as required under law. Besides, the attesting witness D.W.3 is the son-in-law of the testator. The evidence of D.W.1 would go to show that the other attesting witness not present and D.W.3 alone was present. This fact also clearly create serious doubt about another attesting witness signing the Will at the relevant point of time. Only the beneficiaries of the family members actively took part in the preparation of the Will. That also create a serious doubt. D.W.2 evidence shows that she is totally ignorant about the presence of the other witness. All these facts cumulatively taken together create a serious doubt about the Will and the Will also has not been proved in the manner known to law. Accordingly, this Court hold that the finding of the trial Court that the Will has been proved in the manner known to law and the properties also have been purchased from the self earnings of the said Balarama Reddy is not based on the proper appreciation of evidence. This Court has no other option, except to set aside the above finding.

23. Though the learned trial Judge has calculated the share taking into consideration of the Act 1 of 1990 of the Amended Indian Succession Act and held that the first defendant is married prior to the year 1999 and therefore, she cannot be treated as a coparcener and reduced the share. It is to be noted that it is not the case of the plaintiffs that the defendants are not entitled to a share as a coparcener. Issue as to whether daughter married before 1989 or not, is not an issue between the parties in the suit. In fact, the P.W.1 in her chief examination has stated that all are equally entitled to 1/6th share in the properties. There is no pleading with regard to the entitlement of the shares as per Act 1 of 90 of

Tamilnadu Amendment Act. Further there is no evidence to show that when the defendants were married either before 1989 or 1990 and merely on the basis of the truncated admission of D.W.1 in the cross examination, the learned trial Court presumed that she was married only before 1989. P.W.1 in the chief examination stated that in the plaint, in para 2, that the plaintiffs each are entitled to 1/6th share in all the items of the suit properties and the remaining 2/6 share defendants are entitled. It is also admitted case of both sides that mother of the parties was examined as D.W.2 and she is also no more. Therefore, any share she would have derived from her husband also now go to her children, namely the plaintiffs and the defendants. Accordingly, this Court hold that the plaintiffs 1, 3, 4 each entitled to 1/6 share in the suit properties. The legal representatives of the second plaintiff, namely, plaintiff 5 to 8 are altogether entitled to 1/6 share in the suit properties.

24. Accordingly, a preliminary decree is passed with the above modification and the appeal is allowed. Considering the relationship between the parties, No cost. Consequently, the connected miscellaneous petition is closed.

Sd/-

Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

vrc

To:

The Additional District Judge, Fast Track Court-III,
Tiruvallur.

+1cc to Mr.V.Ganesh, Advocate sr.16817

+1cc to Mr.V.Chandrakanthan, Advocate sr.16783

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