

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.09.2017

CORAM

THE HON'BLE MR. JUSTICE R.SUBRAMANIAN

AS.No.730 of 2008

1. Vasantha (Deceased)
2. Kanchana alais Gandhimathi
3. R.Mohan Raj
4. M.Indira
5. R.Ramakrishnan
6. R.Vijaya Kumar
7. V.Lakshmi

(Appellants 3 to 7 brought on record
as LR's of deceased 1st Appellant by
the order dated 03.02.2014 in
M.P.No.1/2012 in AS.No.730/2008)

...Appellants/Plaintiffs

vs.

1. Thirugnanammal
2. Balasubramaniayan
3. Seetha
4. A.Lakshmi
5. R.Padma
6. S.Bala
7. G.Udayakumar
8. M/s.G.R.Thangamaligai Jewellers Pvt.Ltd.
Rep. By its Manager, Mr.S.G.Saravanan
Office at No.138, Usman Road,
T.Nagar, Chennai - 600 017.

(R8 impleaded as party respondent vide
Order dated:28/02/2014 made in MP 2/12
in AS.730/08)

9. N.Krishnaveni
10. P.Nadanasigamani
11. P.Ponnusamy
12. Sethu Ulaganathan
13. Kasthuri
14. R.Palanisamy
15. Kumarasamy Radha
16. R.Subramanian
17. R.Krishnamorthy
18. R.Guna Sekaran

(Respondents 9 to 18 impleaded as party
respondents by order dated 20.04.2016

<https://hcservices.ecourts.gov.in/hcservices/>

in M.P.No.2 of 2011)

... Respondents/Defendants

Appeal suit is filed under Section 96 of Code of Civil Procedure to set aside the judgment and Decree made in O.S.No.30 of 2005 dated 25.07.2007 on the file of the Additional District Court, Fast Track Court - II, Kancheepuram.

For Appellants : Mr.R.Thirugnanam

For Respondents: Mr.Easwar Ayyadurai for R1 to R7
Mr.P.B.Balaji for R8

J U D G M E N T

The plaintiffs in OS.No.30 of 2004 are the appellants. The suit was filed by the plaintiffs claiming that the suit properties belonged to their father Annamalai Nadar who according to them died intestate on 01.12.1957 leaving behind his wife Nagammal, the plaintiffs herein and a son by name Sundararajan who is the husband of the first defendant and father of the defendants 2 to 6. The 7th defendant is alienee to the property from the defendants 1 to 6.

2. According to the plaintiffs, the first plaintiff even after her marriage continued to reside with her father and brother in the suit property. It is stated that Nagammal wife of Annamalai Nadar died on 29.07.1988 intestate and the son Sundararajan died on 08.02.2002. It is after the death of the said Sundararajan, the plaintiffs issued the legal notice on 18.08.2003 demanding share in the property.

3. The defendants 1 to 6 sent a reply on 01.09.2003, claiming that the deceased Annamalai Nadar had executed a registered Will dated 16.11.1957 bequeathing the suit properties to his son Sundararajan and bequeathing certain other properties situated in Kurumbal Village of Thiruthuraipoondi Taluk, Thiruvavarur District in favour of one Manonmaniammal who is the daughter of Annamalai Nadar through his first wife. The plaintiffs sent a rejoinder disputing the validity and genuineness of the said Will and thereafter, filed the present suit seeking partition of their 2/3 share.

4. The suit was resisted by the defendants 1 to 6 as well as 7th defendant contending that the plaintiffs have no right to demand a partition in view of the Will left behind by Annamalai Nadar dated 16.11.1957. The 7th defendant who is the purchaser contended that he is a bonafide purchaser for value without notice of the plaintiffs alleged claim for partition. The written statement in the suit itself was filed by the purchaser, the 7th defendant and the same was adopted by the defendants 1 to 6. It was also claimed that the suit was bad for non joinder of necessary parties, since the plaintiffs have not chosen to implead the daughters of Annamalai Nadar through his first wife who were admittedly clause I heirs.

5. On the basis of the above pleading the learned trial Judge framed the following issues :

1. Whether Annamalai Nadar executed a Will in favour of 1st Defendant's husband and the same will bind the plaintiffs?

2. Whether the suit is bad for non joinder of necessary parties?

3. Whether the plaintiffs have got equal share in the schedule property?

4. To what other reliefs the plaintiffs are entitled to?

6. On the side of the plaintiffs, the first plaintiff was examined as PW1 and Exs.A1 to A13 were marked. On the side of the defendants, the first defendant was examined as DW1 and the purchaser seventh defendant was examined as DW2 and Exs.B1 to B18 were marked.

7. On a consideration of the evidence on record the learned trial Judge relied upon the presumption of Section 90 of Evidence Act relating to old documents and held that the Will marked as Ex.B5 dated 16.11.1957 has been proved and therefore, the plaintiffs cannot claim a share in the property. The learned trial Judge also concluded that the suit is also bad for non joinder of necessary parties namely the daughters through first wife of Annamalai Nadar. Aggrieved the plaintiffs are on appeal.

8. The first plaintiff died pending appeal and her legal representatives were impleaded as appellants 3 to 7. After the dismissal of the suit the 7th respondent/ 7th defendant sold the property to the 8th respondent and the 8th respondent was impleaded in the appeal. With a view to cure the defect of non joinder of necessary parties, the legal representatives of the daughters of Annamalai Nadar through his first wife were impleaded as respondents 9 to 18. However, the property that was bequeathed to Manonmaniammal one of the daughters under Will was not made subject matter of the suit. No amendment of the plaint was sought for regarding the shares claimed in the suit.

9. Heard Mr.R.Thirugnanam, learned counsel appearing for the appellants, Mr.Easwar Ayyadurai, learned counsel appearing for the respondents 1 to 7 and Mr.P.B.Balaji, learned counsel appearing for the 8th respondent. The respondents 9 to 18 namely the legal representatives of the daughters of Annamalai Nadar through his first wife though served are not appearing either in person or through counsel. The non-appearance is probably because of the non-inclusion of the property bequeathed to Manonmaniammal under the Will.

10. Mr.R.Thirugnanam, learned counsel for the appellants would contend that the trial Court has erred in drawing a presumption under Section 90 of the Evidence Act relating to

old documents in respect of Will. Relying upon the judgment of Bharpur Singh and others Vs. Shamsher Singh reported in (2009) 3 SCC 687, he would contend that in view of categorical pronouncement of the Hon'ble Supreme Court the Will being the document which requires special proof under Section 68 of the Evidence Act, cannot be held to be proved by invoking Section 90 of the Evidence Act, and contended that in the absence of examination of attester or examination of person who have knowledge of the signature of the attester and the testator, a Will cannot be said to have been proved.

11. In other words, the learned counsel would contend that a Will has to be proved in terms of Section 68 or 69 of the Evidence Act. In the absence of such evidence the trial Court was not right in concluding that the Will has been proved.

12. Per contra Mr.P.B.Balaji, learned counsel appearing for the 8th respondent would contend that the appellant cannot be heard to contend that the Will has not been proved. According to him, by their conduct the appellants have acquiesced to the Will and having remained silent from the year 1957, i.e., death of Annamalai Nadar till issuance of the notice on 18.08.2003, the plaintiffs cannot be allowed to challenge the Will which had admittedly resulted in the defendants being put in dis-advantageous position.

13. Mr.P.B.Balaji, learned counsel would further contend that the impleading of legal representatives of the children of first wife of Annamalai Nadar in the appeal cannot cure the defect of non impleading. He would also contend that though the legal representatives have been impleaded the property namely an extent of 1 acre 10 cents which was bequeathed to Manonmaniammal under a Will has not been made subject matter of the suit. Therefore, he would contend that the suit is bad for partial partition and relied on the judgment of this Court in Gandhi Vs. Saminatha Gounder and another reported in 2006 (1) CTC 267.

14. On the above rival contentions the following points arise for determination in this appeal:

1. Whether the trial Court was right in invoking presumption of Section 90 of the Evidence Act to hold that Ex.B5, Will dated 16.11.1957 has been proved in accordance with Law?

2. Whether the suit is bad for non joinder of necessary parties as well as for partial partition?

Point No.1 :

15. This question is actually covered by the judgment of Bharpur Singh and others Vs. Shamsher Singh reported in (2009) 3 SCC 687 which has been followed in M.B.Ramesh (Dead) by LRs

Vs. K.M.Veeraje Urs (Dead) by LRs reported in (2013) 7 SCC 490. Therefore, the trial Court was not right in invoking presumption under Section 90 to conclude that the Will dated 16.11.1957 has been proved in accordance with law. No doubt, true, it is a registered Will, but the propounders namely the defendants 1 to 7 should have examined the attestors of the Will. Of course, they have examined DW2 who is the son of the scribe but his evidence does not relate to the execution of attestation of the Will. He has only identified his father's signature in the Will.

16. Therefore, the conclusion of the trial Court that the Will has been proved in accordance with the statutory requirements under Section 68 and 69 of the Evidence Act cannot be sustained. Hence, the said finding of the trial Court that the Will, Ex.B5 dated 16.11.1957 has been proved in accordance with law has to be set aside and accordingly, it is set aside.

Point No.2 :

17. The fact that Annamalai Nadar and his first wife had two daughters namely Kanakambujammal and Manonmaniammal is not denied. Even in the written statement filed by the 7th defendant a plea relating to non joinder of those two daughters has been specifically taken. Despite such a plea and a issue having been framed in the trial Court, the plaintiffs did not chose to implead or to amend the plaint in respect of the shares that they would be entitled to. The plaintiffs wanted to suppress the very existence of those two daughters and take larger shares. This conduct shows the avariciousness on the part of the plaintiffs.

18. However, left without any other option, in view of the findings of the trial Court on non joinder of necessary parties, the plaintiffs had now filed an application in the appeal seeking to implead the legal representatives of the daughters of Annamalai Nadar through his first wife, but, at the same time, the plaintiff have not chosen to amend the plaint till date. They did not want to recognize the right of those two daughters.

19. The impleading of the legal representatives of the daughters of Annamalai Nadar namely Kanakambujammal and Manonmaniammal, in my considered opinion, will not cure the defect in institution of the suit. Therefore, the suit was rightly dismissed by the learned trial Judge on the ground that necessary parties have not been impleaded in the suit. Once the Will is not proved the daughters of Annamalai Nadar through his first wife will also be entitled to a share in the property, including the property at Kurumbal Village, Thiruthuraipoondi Taluk of Thiruvavarur District which under the Will has been bequeathed to Manonmaniammal namely one of the daughters of Annamalai Nadar through his first wife.

20. The attempt by the plaintiffs to implead the legal representatives is half hearted, in my considered opinion. Though the plaintiffs have now chosen to implead the legal representatives of the daughters of Annamalai Nadar through his first wife, they have not chosen to include the property which bequeathed to Manonmaniammal under Will dated 16.11.1957 in the suit. Therefore, the suit is bad for partial partition.

21. Mr.R.Thiurugnanam, learned counsel would contend that his plea was not taken by the trial Court. In my opinion, it is not necessary. The existence of the property is not in dispute, therefore, once it is shown that the property which admittedly belongs to the predecessor has not been included it will entail the defendants to seek dismissal of the suit on that ground.

22. In Gandhi Vs. Saminatha Gounder and another reported in 2006 (1) CTC 267 this Court has held that even non inclusion of one item of jewel belonging to the family, the existence of which has been admitted was held to be fatal to the suit. This Court had relied by the judgment of the Hon'ble Supreme Court in Kenchegowda (since deceased) by Legal Representatives Vs. Sri Slddegowda @ Motegowda, reported in JT 1994 (4) SC 125.

23. I am of the considered opinion that the trial Court was right in dismissing the suit on the ground of non joinder of necessary parties, I also find the suit is bad for partial partition.

24. Hence, the appeal is dismissed with costs, payable by the appellants to the respondents.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

dsa

To

The Additional District Court,
Fast Track Court - II, Kancheepuram.

Copy to

The Section Officer,
VR Section, High Court, Madras.

+lcc to Mr.P.B.Ramanujam, Advocate SR.No.63224

+lcc to Mr.R.Thirugnanam, Advocate SR.No.63420

AS.No.730 of 2008

SAI (CO)