

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.11.2016

PRONOUNCED ON:11.01.2017

CORAM :

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.352 of 2011

&

M.P.No.1 of 2011

1. Venkatrayalu
2. Balasubramanian ... Appellants/Appellants/Defendants 8&9

Vs.

1. Saraswathi Ammal
2. Jayalakshmi Ammal ... Respondents 1 & 2/Respondents
1&2/Plaintiffs

3. Veera Reddiyar
4. Govindapillai
5. Rajagopal Padayachi
6. Vanaja
7. Kannan
8. Petter Abeer
9. Vasantha Ammal ... Respondents 3 to 9/Respondents 3 to
9/Defendants 1 to 7
10. Manikandan ... 10th Respondent/10th
Respondent/10th Defendant

(RR3 to 10 Exparte and dispense with
vide Court order dated 20.3.14)

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 20.09.2010 passed in A.S.No.61 of 2010 on the file of the Principal District Court, Villupuram, confirming the judgment and decree dated 26.04.2007 passed in O.S.No.6 of 2004 on the file of the II Additional District Munsif Court, Ulundurpet.

For Appellants : Mr.T.S.Baskaran
For Respondents : Mr.R.Rajarajan
1 and 2

J U D G M E N T

Challenge in this Appeal is made by the defendants 8 & 9 against the Judgment and decree dated 20.09.2010 passed in

A.S.No.61 of 2010 on the file of the Principal District Court, Villupuram, confirming the judgment and decree dated 26.04.2007 passed in O.S.No.6 of 2004 on the file of the II Additional District Munsif Court, Ulundurpet.

2.Suit for partition.

3.The case of the plaintiffs in brief is as follows:

The suit 'B' schedule properties originally belonged to the first defendant and his father Ranga Reddiar as their joint family properties. The plaintiffs 1 and 2 and the seventh defendant are the daughters of Ranga Reddiar and the sisters of the first defendant. The first defendant and Ranga Reddiar had divided their joint family properties under a registered Partition Deed dated 09.02.1972, wherein, the suit 'A' schedule properties were allotted to Ranga Reddiar and the suit 'B' schedule properties were allotted to the first defendant and each of them were put in exclusive possession and enjoyment of their respective shares. Some of the items were omitted to be included in the above said partition deed and the said omitted properties are the separate properties of Ranga Reddiar. Ranga Reddiar died intestate on 25.05.1996 leaving behind the plaintiffs 1 and 2, the seventh defendant and the first defendant as his legal representatives. Thus, the plaintiffs are entitled to 1/4th share in the suit 'B' schedule properties and inasmuch as the first defendant in order to defeat the lawful claim of the plaintiffs has sold some of the items of the suit properties in favour of the defendants 2 to 6, they had been arrayed as the parties. The first defendant has no right to execute the sale deeds with reference to plaintiffs lawful share in the suit properties. The plaintiffs sent a legal notice dated 03.12.2003 calling upon the first defendant to effect partition. The first defendant did not respond. Hence, the suit.

4.The case of the first defendant in brief is as follows:

The relationship set out is true and the Partition Deed dated 09.02.1972 is also admitted. It is true that some of the items were left out in the Partition Deed dated 09.02.1972 and the left out properties are not the separate properties of Ranga Reddiar. They are the joint family properties of Ranga Reddiar and the first defendant. As per the recitals found in the above said partition deed, the left out properties were equally divided between Ranga Reddiar and the first defendant under the oral partition during the Chithirai month of 1975 in the presence of relatives and the panchayatars and each of them were allotted separate shares and thus, they then on enjoying their respective shares. The suit properties are not

the separate properties of Ranga Reddiar and the plaintiffs are not entitled to claim 1/2 share in them. Item Nos.1 to 16 of the suit properties alone were allotted to the share of Ranga Reddiar under the Partition Deed dated 09.02.1972. Item Nos.17 to 19 and 21 to 37 are the left out properties and as per the oral partition, Ranga Reddiar and the first defendant were given equal share in those properties and put in the exclusive possession and enjoyment of their respective shares. Ranga Reddiar had executed an unregistered Will dated 25.01.1996 bequeathing his separate properties in favour of his grandsons namely the defendants 8 & 9, who are the sons of the first defendant. After the demise of Ranga Reddiar on 25.05.1996, his Will dated 25.01.1996 came into force and thus the defendants 8 & 9 had become the absolute owners of item Nos.1 to 16 and ½ share in Item Nos.17 to 37 of the suit properties. The 17th item of the suit properties had been jointly sold by the defendants 1, 8 & 9 to the sixth defendant under the Sale Deed dated 01.09.2003 and there is no cause of action for the suit and the suit is liable to be dismissed.

5.The seventh defendant has adopted the defence set out by the first defendant and further pleaded that during her marriage and the marriage of plaintiffs adequate seers were presented and therefore, they have not demanded for partition and in case her shares are declared she is ready to pay the court fees and prayed for the dismissal of the suit.

6.In support of the plaintiffs case, PW1 has been examined. Ex.A1 to A15 were marked. On the side of the defendants, DW1 to 5 have been examined. Ex.B1 to 20 were marked. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial court was pleased to declare that the plaintiffs each are entitled to 1/4th share in item Nos.1 to 16 of the suit properties and 1/8th share in item Nos.17 to 38 of the suit properties and accordingly granted a preliminary decree in favour of the plaintiffs. The defendants 8 and 9 preferred the first appeal. The first Appellate Court also confirmed the judgment and decree of the trial court and dismissed the appeal. Hence, the Second Appeal by the defendants 8 and 9.

7.The Second Appeal was admitted and the following substantial questions of law are formulated for consideration in this second appeal.

(a)Whether the Courts below had committed a grave error in law by holding that Ex.B3, Will was not proved on the ground that the appellants had not produced any admitted signature of the testator and further the Courts itself assumed the role of experts by comparing the ink found in the signature of the

testator in the Will and the ink found in the remaining portion of the Will?

(b) Whether the first Appellate Court was right in disbelieving Ex.B3, Will on the ground that it seems to be a new one and not genuine when the appellants had examined the two attesting witnesses and they had spoken about the due execution and valid attestation of the will as contemplated under Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act?

8. The relationship between the contesting parties is admitted. The plaintiffs and the seventh defendant are the daughters and the first defendant is the son of Ranga Reddiar. Claiming that the suit properties are the separate properties of Ranga Reddiar, the plaintiffs have laid the suit for partition of their due shares. Prior to the suit, notice was issued by the plaintiffs for effecting partition and as the first defendant did not respond to the same, according to the plaintiffs, the suit has been laid. According to the contesting defendants namely, the defendants 1, 8 & 9 under the Partition Deed dated 09.02.1972, the copy of which has been marked as Ex.A1, item Nos.1 to 16 of the suit properties were allotted to Ranga Reddiar and some other properties were allotted to the first defendant. Therefore, as per the defence set out by the contesting defendants, item Nos.1 to 16 of the suit properties are found to be the separate properties of Ranga Reddiar. According to the contesting defendants, as regards the left out properties of the joint Hindu family consisting of Ranga Reddiar and the first defendant, as per the recitals found in Ex.A1, oral partition was effected during the year 1975 and thereby Ranga Reddiar and the first defendant were allotted equal share in the left out properties. Thus according to the contesting defendants as regards the item Nos.17 to 38 of the suit properties, Ranga Reddiar had been allotted only $\frac{1}{2}$ share in them. Further according to the contesting defendants, Ranga Reddiar had executed a Will dated 25.01.1996 bequeathing his properties in favour of the defendants 8 and 9, who are the sons of the first defendant and therefore, according to the contesting defendants, the plaintiffs are not entitled to claim any share in the suit properties.

9. As adverted to earlier, item Nos.1 to 16 of the suit properties are admitted to be the separate properties of Ranga Reddiar. Therefore, it could be seen that in those items as the daughters of Ranga Reddiar, the plaintiffs each would be entitled to obtain $\frac{1}{4}$ th share.

10. According to the contesting defendants under the oral partition effected during the year 1975, the left out properties were divided equally between Ranga Reddiar and the first defendant in the presence of relatives and the mediators. The plea of oral partition set out by the contesting defendants is disputed by the plaintiffs. As seen earlier, the plaintiffs issued a pre-suit notice claiming partition. If really the oral partition now pleaded by the contesting defendants is true, repudiating the claim of the plaintiffs, the defendants would have averred about the oral partition which took place between Ranga Reddiar and the first defendant during the year 1975 and sent a suitable reply to the plaintiffs. However, it has been admitted that no reply has been sent to the pre-suit notice.

11. Further, as found by the Courts below, the contesting defendants have not pleaded as to when actually the oral partition took place and in whose presence in particular the oral partition was effected and what are the properties in particular were allotted to Ranga Reddiar and the first defendant under the oral partition and whether after the division under the oral partition mutation of records had been effected in the property so allotted to Ranga Reddiar and the first defendant. The Courts below also disbelieved the evidence of DW2, with reference to oral partition and held that his evidence is unreliable and cannot be acted upon. The approach of the Courts below as regards the rejection of the evidence of DW2 does not call for any interference.

12. Therefore, as rightly found by the Courts below, the contesting defendants have miserably failed to establish the plea of oral partition set up by them, in respect of the left out properties not covered under Ex.A1. Resultantly, it could be seen that as found by the Courts below and as per the recitals of Ex.A1, the left out properties will partake the character of the joint family properties of Ranga Reddiar and the first defendant and therefore, it could be seen that both Ranga Reddiar and the first defendant would be entitled to equal $\frac{1}{2}$ share in item Nos.17 to 38 of the suit properties. So focused, it could be seen that the plaintiffs would be each entitled to obtain $\frac{1}{8}$ share in item Nos.17 to 38 of the suit properties.

13. However, resisting the case of the plaintiffs in its entirety, the contesting defendants have projected the Will, alleged to have been executed by Ranga Reddiar on 25.01.1996, which has been marked as Ex.B3. The truth and validity of Ex.B3, Will has been challenged by the plaintiffs. As rightly found by the Courts below there are various suspicious circumstances revolving around Ex.B3, Will. Firstly, if Ranga Reddiar had executed Ex.B3, Will as now alleged by the contesting defendants, they would have sent a suitable reply to the pre-

suit notice issue by the plaintiffs pointing out about the said Will and repudiated the claim of the plaintiffs. However, as found earlier, the contesting defendants have not responded to the pre-suit notice by sending a reply. Secondly, the Will in question namely, Ex.B3 does not indicate as to in respect of which properties, the same had been executed. The description of the properties is conspicuously absent in Ex.B3, Will. Thirdly, there is no reference about the alleged oral partition pleaded by the defendants in Ex.B3, Will.

14.Fourthly, as found from the evidence of DW1 to 3, it could be seen that the beneficiaries and the beneficiary's father namely the first defendant took an active part in the execution of the Will. In this connection, the first defendant, examined as DW1, has admitted that he was present at the time of the execution of the Will and the Will had been executed in his house and one Sampath was the scribe and K.Elumalai and Kuppusamy had attested the Will and they belonged to his village and the Will was executed in white paper in two sheets and it was executed in the year 1996 and he had read the recitals of the will and there is no reference about the ailment of his father in the Will. The eighth defendant examined as DW2, during the course of cross examination, has admitted that he was present at the time of execution of Ex.B3, Will and it is true that the description of the properties are not mentioned in the Will and it is true that there is no reference about the oral partition effected between his father and the grandfather in the Will, the attesor Balakrishnan is his father-in-law and the husband of the seventh defendant and even during the life time of his grandfather, he had effected the change the patta in respect of the properties covered under the Will and also paying kist in respect of the said properties and also effected change of patta in the name of his brother, the ninth defendant. Therefore, as rightly found by the Courts below both the beneficiaries and their father had been present during the execution of the Will and evidently it could be seen that they have taken an active participation in the execution of the Will. The above factor also throw a serious doubt about the genuineness of the Will.

15.Fifthly, as adverted to earlier even during the life time of Ranga Reddiar, the defendants 8 & 9 had effected mutation of records in respect of the properties covered under the Will. As seen earlier that it has been admitted that the patta in respect of the properties covered under the Will had been changed in the name of the defendants 8 and 9 and they were also paying kists in respect of the said properties. This throw a serious doubt in the truth and validity of Ex.B3, Will said to have been executed by Ranga Reddiar.

16.Sixthly, inasmuch as Ranga Reddiar and the first defendant could not jointly enjoy the properties, it could be visualized that they had effected the partition in respect of the properties and enjoying their respective allotted shares separately. Therefore to say that subsequently, Ranga Reddiar had executed Ex.B3, Will bequeathing his properties to the defendants 8 and 9 under the unregistered Will is highly doubtful and not acceptable. If really there had been a change of mind on the part of the Ranga Reddiar and he had really intended to execute a Will bequeathing his properties to his grandsons as now put up by the defendants, the Will would have been duly registered. This is also throws a serious doubt in the authenticity of the Will.

17.Seventhly, as found by the Courts below, Ex.B3, Will seems to be of a new origin, does not appear to have been executed during the year 1996. This also throws suspicion on the genuineness of the Will in question. Eighthly, in item Nos.17 to 37 of the suit properties Ranga Reddiar would be entitled to get only 1/2th share. However, there is no specific reference that in respect of those items only his 1/2th share had been bequeathed. As seen earlier, there is no description of the properties at all in Ex.B3, Will.

18.Now coming to the question of the proof of the Will, as per law, the defendants have examined as the attestors of the Will as Dws4 and 5. DW4, Balakrishnan, is the father-in-law of the 8th defendant and also the husband of the seventh defendant. As seen earlier, the seventh defendant is supporting the case of the defendants 1, 8 and 9, DW4 has admitted that at the time of the execution of the Will, the first defendant, the seventh defendant and even the plaintiffs were present, however, the description of the properties are not incorporated in the Will, he has further admitted that at the time of execution of the Will Ranga Reddiar was not in good health. The other attestor examined as DW5 has deposed that he has not seen the signature of Ranga Reddiar in Ex.B3. Further, he has also stated that Ranga Reddiar was not having any pen and he had put his signature using the pen of the scribe. As rightly found by the Courts below, the ink of Ranga Reddiar's signature and the scribe's writings are found to be varying. That has been positively admitted by DW5. Further, DW5 has also admitted that he used to work under the first defendant in his lands. Therefore, it could be seen that DW4 is the father-in-law of one of the beneficiaries. DW5 is a worker under D1. In such circumstances, the Courts below have doubted the evidence of DW4 & 5 to uphold the truth and validity of the Will in question. Further, the Will in question is seriously impugned by the plaintiffs. In such circumstance, the defendants, who are propounders of the Will should have taken steps to send the Will

for expert examination alongwith the admitted signatures of the executant. However, the defendants have not endeavoured to do so.

19.All the above suspicious circumstances surrounding the Will in question and also the close acquaintance of the attestors of the Will with the contesting defendants and the other attendant factors with reference to the execution of the Will made the Courts below to come to the conclusion that the contesting defendants have failed to establish the genuineness and the validity of the Will in question. Therefore, when there are factors pointing out to the suspicious nature of the Will as disclosed above and when it is found and also admitted that the attestors are closely acquainted with the beneficiaries and also related and when the propounders of the Will have not subjected the Will for expert examination to prove its genuineness, nothing warrants to interfere with the findings of the Courts below in holding that the contesting defendants have failed to establish the truth and validity of the Will.

20.The learned counsel for the respondents in support of their case has submitted the decisions reported in 2013(2) LW 255(Kasthuri Ammal & Others Vs. G. Sampath), 2011(3) LW 774 (N.Govindarjan Vs. N.Leelavathy & Others). The principles of law enunciated in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

21.At the end, the substantial questions of law formulated in this second appeal are answered against the appellants and in favour of the respondents. Resultantly, the Second Appeal fails and is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

सत्यमेव जयते
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
Villupuram.

2. The IInd Additional District Munsif,
Ulundurpet.

+1cc to Mr.T.Gandhi, Advocate Sr.2872

+1cc to Mr.T.S.Baskaran, Advocate Sr.2943

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