

IN THE HIGH COURT OF JUDICATURE AT MADRAS**RESERVED ON : 03.03.2017****PRONOUNCED ON : 21.03.2017****CORAM****THE HONOURABLE MR. JUSTICE T.RAVINDRAN****S. A.No.660 of 2011****and****M.P.No.1 of 2011**

1.Rathina Kumari
 2.Jayalatha
 3.S.Senthil Kumar

...

Appellants

Vs.

1.A.Govindasamy
 2.A.Subramanian
 3.A.Rajalakshmi

...

Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 08.12.2010 passed in A.S.No.52 of 2009 on the file of I Additional District Court, Coimbatore, confirming the judgment and decree dated 16.10.2008 passed in O.S.No.209 of 2004 on the file of the Principal Sub Court, Coimbatore.

For Appellants	: Ms.P.T.Asha
For Respondents	: Mr.R.Karthikeyan

JUDGMENT

Challenge in this second appeal is made by the plaintiffs against the judgment and decree dated 08.12.2010 passed in A.S.No.52 of 2009 on the file of I Additional District Court, Coimbatore, confirming the judgment and decree dated 16.10.2008 passed in O.S.No.209 of 2004 on the file of the Principal Sub Court, Coimbatore.

2. The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal:

“ Whether the judgment and decree of the Courts below in dismissing the suit laid by the plaintiffs are based upon perverse findings and conclusions and misdirected against the evidence on record ”

3. The suit has been laid by the plaintiffs for partition.

4. The first plaintiff is the wife and the plaintiffs 2 & 3 are the children of Shanmugha Sundaram, who is no more. The deceased Shanmugha Sundaram and the defendants 1 & 2 are the sons of Ayyasamy Thevar. The 3rd defendant is the daughter of Ayyasamy Thevar. As regards the above said relationship between the parties, there is no dispute.

5. As seen from the case of the parties and also the evidence adduced in the matter, it is found and also admitted that the suit properties as a vacant site had been purchased by Vellingiri Thevar, who is the father of Ayyasamy Thevar under the sale deed dated

28.08.1913, which has been marked as Ex.A1. It is also found that Vellingiri Thevar had subsequently died and when he passed away, it is found that his only son viz., Ayyasamy Thevar was only 6 months old. In such view of the matter, it is found that as per law, then in force, the properties acquired by Vellingiri Thevar under Ex.A1 had been inherited by Ayyasamy Thevar as his ancestral properties and therefore, it could be seen that the sons of Ayyasamy Thevar viz., A. Shanmugha sundaram and the defendants 1 & 2 also have a right in the suit properties by birth. It is also found that Ayyasamy Thevar had another son by name Kandasamy. The admitted case of the parties is that Kandasamy had released his right in the said properties in favour of the other members of the family by way of a release deed dated 30.05.1969, which has been marked as Ex.A3. As seen from the recitals found in Ex.A3 and also as admitted by all, it has been clearly recited in Ex.A3 that Kandasamy had described the suit properties only as the ancestral properties and he had released his right in respect of the same in favour of the other joint family members. Therefore, it could be seen that the suit properties had been inherited, as the ancestral properties of Ayyasamy Thevar and his sons, from Vellingiri Thevar and as such, Ayyasamy Thevar and his sons enjoyed the same as their joint family properties. In this connection, the second

defendant A.Subramanian examined as DW4 has also admitted during the course of his evidence that his father Ayyasamy Thevar had managed the suit properties as the karta. In such view of the matter, it is evident that by birth, the sons of Ayyasamy Thevar had a right in the suit properties and therefore, it is found that as such Ayyasamy Thevar and his sons namely A.Shanmugha Sundaram and the defendants 1 & 2 had equal right in the suit properties. In other words, it is found that after the release deed marked as Ex.A3 by Kandasamy, it is found that Ayyasamy Thevar and his remaining three sons would be entitled to each $\frac{1}{4}$ th share in the suit properties. As such, it could be seen that Ayyasamy Thevar would not be entitled to dispose of the entire suit properties without the consent of the other co-sharers namely the deceased A.Shanmugha Sundaram and the defendants 1 & 2.

6. Now according to the plaintiffs, inasmuch as the deceased A.Shanmugha Sundaram had a right and share in respect of the suit properties and inasmuch as they had not been allotted their due share, despite several demands, it is contended that they had been necessitated to lay the suit for partition.

7. The claim of the partition sought for by the plaintiffs is being resisted by the defendants on the footing that Ayyasamy Thevar, during his life time had executed a Will in respect of the suit properties allotting separate shares to his children and therefore, it is the case of the defendants that though the said document has been styled as a Will, it is actually a partition deed and thus, according to the defendants, inasmuch as Ayyasamy Thevar had effected partition of the suit properties amongst his sons under the Will, it is the case of the defendants that the plaintiffs are not again entitled to seek partition of the suit properties. In this connection, the Will relied upon by the defendants has been marked as Ex.B12, which is dated 29.09.1980. It is the case of the defendants that prior to Ex.B12, Ayyasamy Thevar had executed an earlier Will dated 05.09.1980, which has been marked as Ex.B11 and cancelling the said Will, he had executed the Will marked as Ex.B12. Therefore, it is found that for resisting the case of the plaintiffs, the defendants have placed reliance upon Ex.B12 Will.

8. A perusal of the recitals found in Exs.B11 & 12 and also the admitted the case of the parties, it is noted that the suit properties have been described as the ancestral properties even by Ayyasamy

Thevar. Therefore, it could be seen that Ayyasamy Thevar is also aware of the nature of the suit properties and accordingly, described the same as the ancestral properties, even in the alleged Wills executed by him marked as Exs.B11 and B12. As adverted supra, in the release deed marked as Ex.A3, his son Kandasamy had also described the suit properties as the ancestral properties. Further, as seen earlier, even the second defendant in his evidence has admitted that Ayyasamy Thevar had enjoyed the suit properties only as the Karta of the joint family. It is, therefore, found that the parties inclusive of Ayyasamy Thevar are well aware about the character of the suit properties, namely, the same being ancestral properties.

9. When it is found that the suit properties are the ancestral properties, it has to be seen whether Ayyasamy Thevar would be entitled to dispose of the same under the Will marked as Ex.B12. When it is found that the suit properties are only the ancestral properties belonging to the joint family consisting of Ayyasamy Thevar and his three sons, it does not stand to reason as to how Ayyasamy Thevar would be entitled to dispose of the entire suit properties by way of the Will marked as Ex.B12. However, in order to circumvent the above said legal issue, it is found that the defendants have taken a

stand that even though Ex.B12 is styled as Will, it is only a partition deed effected by Ayyasamy Thevar allotting separate share in the suit properties in favour of his children. However, a perusal of Ex.B12 would only go to show that it is in the nature of a Will and not a partition deed as put forth by the defendants. If Ex.B12 is indeed a partition as contended by the defendants, as rightly put forth by the plaintiffs' counsel, the consent of all the co-sharers would have been obtained prior to the execution of the same and in fact, the consent of all the co-sharers and the signature of all the co-sharers would have been obtained in the said document. However, there is no plea or proof on the part of the defendants that the consent of all the co-sharers, particularly, the consent of A.Shanmugha Sundaram had been obtained before the execution of Ex.B12 and that, he has also subscribed to the document marked as Ex.B12 by affixing his signature. But, it is found that Ex.B12 has been executed only by Ayyasamy Thevar styling it as a Will. When Ayyasamy Thevar is not legally entitled to dispose of the entire suit properties by way of a Will, it could be seen that even if the above said Will is accepted to be a genuine document, it would be valid only as regards the extent of his share in the suit properties and not in respect of the shares of the other joint family members. It has to be noted at this juncture that as

rightly put forth by the plaintiffs' counsel, Ex.B12 has also not been registered as a partition deed in the manner known to law. When it is found that Ex.B12 has not been executed by all the co-sharers of the suit properties and when it is not established that the deceased A.Shanmugha Sundaram was a consenting party to Ex.B12, it could be seen that Ex.B12 cannot be styled as a partition deed and equally, it could be seen that Ex.B12 would not bind the plaintiffs.

10. Further, the case of the defendants is that the mother Lakshmi ammal had been given life interest under the Will marked as Ex.B12 and accordingly, after the demise of Ayyasamy Thevar, Lakshmi ammal had been enjoying the suit properties and subsequently, it is the case of the defendants that Lakshmi ammal had executed a consent deed marked as Ex.B13 that the children should accept the shares allotted to them under the Will marked as Ex.B12. However, it has not been established by the defendants as to what is the legal effect of Ex.B13. When Lakshmi ammal has not been conferred any right over the suit properties as per law, it does not stand to reason as to how, by way of a consent deed, marked as Ex.B13, she would be entitled to confirm that Ex.B12 is only a partition deed. When the defendants have failed to establish that Ex.B12 is a

partition deed, it could be seen that the consent deed marked as Ex.B13 would have no legal effect binding upon the parties, particularly, binding upon the plaintiffs. Therefore, Ex.B13 cannot be given any legal character so as to bind the parties, particularly, the plaintiffs.

11. To establish the authenticity of Ex.B12, the defendants have examined one of the attestors to the same as DW2 namely Manoharan. As regards Ex.B12, DW2 has deposed that Ex.B12 had been executed by Ayyasamy Thevar and that, he had attested the same as the first witness and after the execution of the same by Ayyasamy Thevar, he had subscribed to the same by affixing his signature as the first witness and thereafter, the other witness Susila has attested the same and finally, the same had been attested by the concerned scribe. A reading of the evidence of DW2 wholly would go to show that he has not specifically deposed that he has seen Ayyasamy Thevar signing the Will Ex.B12 and he has not specifically deposed that Ayyasamy Thevar had seen him and the other witnesses attesting the document. Therefore, it could be seen that the evidence of DW2 does not satisfy the requirements of the proof of Will as required under law. He would only state that Ayyasamy Thevar had executed the Will and

that, he and other witnesses had attested the same. However, when his evidence is conspicuously absent as regards the attestors witnessing the testator signing the document and the testator witnessing the signing of the attestors, it could be seen that the evidence of DW2 could not be specifically relied upon to uphold the authenticity of the Will Marked as Ex.B12.

12. That apart, it is also found as seen from the evidence of DW1, namely, the first defendant, he has taken active part in the execution of the Will marked as Ex.B12. It is also found that under Ex.B12, DW1 has been allotted the major share. It has not been established by the defendants that the deceased A.Shanmugha Sundaram was aware of the Will marked as Ex.B12. In such view of the matter, it could be seen that when DW1 has taken an active part in the execution of the Will marked as Ex.B12, suspicion arises with reference to the same and in such a position, it could be seen that as rightly argued by the plaintiffs' counsel, no safe credence could be attached to the genuineness of the Will Ex.B12. It is also found that DW1 has admitted that it is he, who had written the consent letter marked as Ex.B13. It could be thus seen that DW1 has played an active part in the execution of Ex.B13 also and thus, when the role of

DW1 i.e. the first defendant is found to be a major one in the execution of the Will Ex.B12 and the consent letter Ex.B13 and as pointed out, the execution of Ex.B12 Will having not been established by the defendants as required by law, no safe reliance could be attached to the document for negating the claim of partition made by the plaintiffs.

13. In this case, there is no clear evidence that the superstructure found on the suit properties, as of now, had been put up by Ayyasamy Thever. It is found that under Ex.A1, the suit properties had been acquired only as vacant land. It is the case of the defendants that Ayyasamy Thevar had, out of his own funds/income, had put up the construction on the suit properties. However, it has been admitted by the defendants during the course of evidence that there is no material or record to establish the same. It is the case of the plaintiffs that the superstructure had been put up by Vellingiri Thevar. However, even with reference to the same, no material is forthcoming. In toto, it could be seen that there is no clear evidence both on the side of the plaintiffs as well as on the side of the defendants as to who had put up the superstructure on the suit properties. Be that as it may, it is found that as seen from the

evidence adduced by the respective parties, rental income had been received by the joint family members from the suit properties. Accordingly, it could be seen that out of the rental income and also out of the other movable properties, the superstructure would have been put up by the joint family members.

14. When Ex.B12 cannot partake the character of the partition deed as per law and when the same is not established to be a partition deed by the defendants and when it is found to be a Will and when it is also found to be that Ayyasamy Thevar is not entitled to dispose of the entire suit properties under the said Will other than his due share, it could be seen that the case of the defendants that pursuant to Ex.B12, each co-sharer had been enjoying the respective shares by making improvements and thus, the contention on their behalf that the suit properties had been already divided cannot be countenanced. When Ex.B12 cannot be construed as a partition deed as per law, in such view of the matter, the evidence adduced by the defendants that they had made improvements in respect of their shares out of their own funds etc cannot be accepted and it is also found that the same would not bind upon the plaintiffs. When the legal character of Ex.B12, as put forth by the defendants, has not been established and when the same

is also not found to be binding upon the plaintiffs, it could be seen that the case of the defendants that the suit properties had been already divided as per Ex.B12, as such, cannot be accepted. Further, it has also not been established by the defendants with acceptable evidence that they had made improvements in their shares, in which, they are stated to be residing separately out of their own independent funds. When it is found that the rental income derived from the suit properties is of substantial nature, it could be seen that the improvements, if at all any made by the defendants, would have been based only upon the income derived from the suit properties and in such view of the matter, it cannot be presumed or held that the improvements had been made in the suit properties by the defendants out of their own independent source.

15. The main defence put forth by the defendants for resisting the plaintiffs' case is Ex.B12. When the case projected by the defendants as regards Ex.B12 goes out, it could be seen that the plaintiffs being the legal heirs of the deceased A.Shanmugha Sundaram would be entitled to their due share in the suit properties.

16. As seen from the evidence adduced by the parties, it is found that A.Shanmugha Sundaram was also blessed with another son viz., Sathishkumar. It is the case of the plaintiffs that Sathish kumar had been found missing since 06.07.1995 onwards, when he was 16 years old and as his whereabouts are not known to the plaintiffs or could not be traced, despite diligent efforts and also publications in newspapers, according to the plaintiffs, he was not added as a party to the suit proceedings and therefore, it is stated that he has taken to be as dead as per law. However, the above case of the plaintiffs did not find acceptance by the Courts below on the footing that other than the paper publications marked as Exs.A9 to 10, the plaintiffs have not placed any evidence to show that they had taken all efforts to trace the whereabouts of Sathishkumar and on that ground, the courts below have held that the plaintiffs' suit should also fail on the ground of non joinder of necessary party i.e. Sathish Kumar.

17. However, as seen from the evidence adduced by the plaintiffs as well as the defendants in a cumulative manner, it is found that even the defendants have admitted that the whereabouts of Sathish Kumar are not known. In this connection, the first defendant examined as DW1 has admitted that Sathish Kumar was not available

even at the time of death of Shanmugha Sundaram and he does not know whether Sathish kumar went missing even during the life time of Shanmugha Sundaram and does not know whether steps have been taken to trace his whereabouts and he did not take any efforts to trace Sathish Kumar and does not know whether the Sathish Kumar did not turn up even after the paper publications. Therefore, as seen from the evidence of DW1, he has not specifically denied that the plaintiffs have not taken due efforts to trace the whereabouts of Sathish Kumar. On the other hand, he has admitted that Sathish Kumar had been missing even from the date of the death of Shanmugha Sundaram. The defendants have not placed any material to hold that Sathish kumar is available since 1995. When it is the specific case of the plaintiffs that Sathish Kumar went missing from 1995 onwards and when the plaintiffs have also established their case by marking the paper publications as Exs.A9 & 10 and when no contra material has been put forth by the defendants to establish that Sathish Kumar is available, it could be seen that the case of the plaintiffs that when Sathish kumar was not found available for more than the period prescribed under law, his absence has to be taken as Civil Death and thus, according to the plaintiffs, he was not added as a party to the suit. The case of the plaintiffs as regards the civil death of Sathish Kumar, in the light of the

above position, cannot be discountenanced. When it has been admitted that Sathish kumar's whereabouts were not known for a long period, as required under law, merely because the plaintiffs have not established the efforts taken by them for tracing him 1995 onwards, it cannot be construed that the plaintiffs had deliberately suppressed the inclusion of Sathish kumar in the suit proceedings. That apart, it has not been established by the defendants as to what would be the gain that could be made by the plaintiffs by not including Sathish kumar as a party to the suit proceeding. Therefore, the above facts, seen cumulatively, would go to establish that as the whereabouts of Sathish kumar were not known for more than the period required under law, it should be taken as if he has attained civil death and accordingly, it is found that the plaintiffs have not impleaded him as a party to the suit proceedings. In such view of the matter, the findings and conclusions of the courts below that the plaintiffs have deliberately not impleaded Sathish kumar as a party to the suit proceedings and hence, the plaintiffs suit should fail on the ground of non joinder of Sathish kumar, as such, cannot be accepted.

18. Inasmuch as it has been held that Ayyasamy Thevar is not entitled to dispose of the whole of the suit properties under Ex.B12, it

could be seen that even assuming that the said Will is accepted to be a true document, it would be valid only to the extent of the share of Ayyasamy Thevar in the suit properties. However, as discussed above, the defendants have not established the authenticity of the Will Ex.B12 as per law. In such view of the matter, it could be seen that as regards the suit properties, Ayyasamy Thevar and his sons would be entitled to equal share and on the demise of Ayyasamy Thevar, his share would devolve upon his legal heirs and so viewed, it could be seen that the plaintiffs would be entitled to obtain 5/16 share in the suit properties as claimed by the them. In the light of the above discussions, it is found that the courts below, without properly appreciating the evidence on record in the correct matter and also without giving proper reasonings and conclusions, have rejected the plaintiffs' case. In other words, it could be seen that the findings and conclusions of the courts below in rejecting the plaintiffs' case are nothing but perverse and erroneous in law. Resultantly, the substantial question of law formulated for consideration in this second appeal is answered in favour of the plaintiffs and against the defendants.

19. The counsel for the plaintiffs, in support of her contention, relied upon the decisions reported in **1959 AIR 443 (H.Venkatachala Iyengar V.B.N.Thimmajamma & Others)** and the decision of the Hon'ble Supreme Court dated 22.04.2010 rendered in Civil Appeal No.4623 of 2005. Similarly, the counsel for the respondents, in support of his contention, placed reliance upon the decisions reported in **(2002) 2 Supreme Court Cases 62 (Darshan Singh and others V. Gujjar Singh (Dead) By Lrs. And others)** and **(1995) 6 Supreme Court Cases 213 (Kashibai and another Vs.Parwatibai and others)**. The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

In conclusion, the judgment and decree of the Courts below are set aside and the plaintiffs are held to be entitled to 5/16 share in the suit properties as claimed by them. Accordingly, preliminary decree is granted in favour of the plaintiffs as prayed for. Accordingly, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

21.03.2017

Index : Yes/No
Internet : Yes/No
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To

1. The I Additional District Court,
Coimbatore.
2. The Principal Sub Court, Coimbatore.

T.RAVINDRAN.J.

sms

**Pre-Delivery Judgment made in
S. A.No.660 of 2011
and
M.P.No.1 of 2011**

21.03.2017

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