

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.06.2017

CORAM:

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

S.A.Nos.92 and 94 of 2016

S.A.No.92 of 2016

R.Subbe Gowder .. Appellant/Appellant/
Plaintiff

vs.

1.Marakkal
2.Suppathal
3.Sarasammal

4. Lakshmi .. Respondents/Respondents/
Defendants

S.A.No.94 of 2016

R.Subbe Gowder .. Appellant/Appellant/
Defendant

vs.

1.Marakkal
2.Suppathal
3.Sarasammal

4. Lakshmi .. Respondents/Respondents/
Plaintiffs

Prayer in S.A.No.92 of 2016 Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 06.07.2015 made in A.S.No.2 of 2015 on the file of the I Additional District Judge, Coimbatore, concurring the finding of the judgment and decree dated 30.07.2014 made in O.S.No.578 of 2009 on the file of the Principal Subordinate Judge, Coimbatore.

Prayer in S.A.No.94 of 2016 Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 06.07.2015 made in A.S.No.1 of 2015 on the file of the I Additional

District Judge, Coimbatore, concurring the finding of the judgment and decree dated 30.07.2014 made in O.S.No.744 of 2011 on the file of the Principal Subordinate Judge, Coimbatore.

For Appellant : Mr.N.Manokaran
in both Appeals for Mr.S.Vinothkumar

For Respondents : Mr.C.Veeraragavan
for R1 to R4

C O M M O N J U D G M E N T

S.A.No.92 of 2016

This second appeal is arising out of the Judgment and Decree passed in A.S.No.2 of 2015 on the file of the Court of First Additional, Sub Judge, Coimbatore, confirming the Judgment and Decree dated 30.07.2014 in O.S.No.578 of 2009 on the file of the Principal Sub-Judge, Coimbatore.

2. The said suit was filed by the appellant/ plaintiff to declare the title of the suit property and for permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the same.

3. It is the case of the appellant /plaintiff that the suit property originally belonged to his father namely Rangae Gowder by virtue of a registered Sale Deed dated 05.04.1959 (Ex.A1) and he is the only son of his father and he has not been imparted with education and he has given all his effort for improving the suit property.

4. The appellant / plaintiff would further aver among other things that in order to make the property cultivable, he has parceled out the suit property and dug up a well by giving physical labour by engaging men and also spent huge amount of money on the said property and the said cultivable land after improvement, have started yielding cash crops like sugarcane, plantain, turmeric etc., and he has also constructed a pucca house facing North and further constructed two tiled cattle sheds.

5. The appellant / plaintiff would further aver that he performed the marriage of his four sisters out of his own income earned from the suit property and also spent huge amount on "Sreethana" and other articles. The appellant / plaintiff had

also looked after his parents very well and therefore, his father Range Gowder, out of his own volition and in a sound and disposing state of mind, has executed a Will dated 15.07.2005 in favour of the plaintiff, thereby bequeathing the suit property absolutely in his favour and after the demise of his father on 19.04.2008, the said Will came into force and thereby, he became the absolute owner of the property. The father of the appellant / plaintiff at the time of execution of the said Will, also handed over the Sale Deed dated 05.04.1959 in respect of the suit property and thereafter, he has created revenue records and started paying statutory levies, as he is in possession and enjoyment of the suit property. The appellant / plaintiff would further aver that though his sisters got married, they suddenly started claiming their right over the suit properties and they also filed a suit on the file of the District Munsif, Coimbatore, despite the fact they are very well aware of the Will executed by his father in favour of the plaintiff. It is a categorical stand of the appellant / plaintiff that since the defendants have no right whatsoever in respect of the suit property on account of the Will (Ex.B4) executed by his father, he is entitled to a decree in the Suit as prayed for with cost.

6. The defendants had filed the written statement denying the averments made in the plaint and took a stand that the Suit property was purchased by their father out of his own income and efforts and since he died intestate, they are entitled for partition and separate possession of the Suit property and also disputed the genuineness of the Will. The defendants would also contend that they have also participated in the agricultural activities to assist his father and on that ground, after his demise, they are entitled to a share in the Suit property and prayed for dismissal of the Suit.

S.A.No.94 of 2016

7. The defendants in O.S.No.578 of 2009 on the file of the Court of the Principal Subordinate Judge, Coimbatore, earlier to the said Suit, filed O.S.No.550 of 2009 on the file of the Court of Additional District Judge, Coimbatore and on account of the amendment made to the City Civil Courts Act, it was transferred to the Principal Subordinate Judge and renumbered as O.S.No.744 of 2011. In the said plaint, the plaintiffs took the very same stand as taken by them in the written statement in O.S.No.578 of 2009 and prayed for partition and separate possession and other consequential reliefs against the defendant, who is the plaintiff in O.S.No.578 of 2009.

8. In O.S.No.744 of 2011, the defendant took the very same stand as taken by him in the plaint in O.S.No.578 of 2009 for laying the claim based on the Will executed by his father.

9. Both the Suits were taken up together for trial and the Trial Court, for the purpose of convenience had adopted the array of parties in O.S.No.744 of 2011.

10. The following issues were framed for trial in O.S.No.744 of 2011:

1. Whether the plaintiffs are entitled for partition as prayed for in the Suit?
2. Whether the Will dated 15.7.2005 was executed by Rangae Gowder?
3. Whether the Will dated 15.7.2005 is valid, legal and genuine?
4. To what other reliefs the plaintiffs are entitled?

11. The following issues were framed for trial in O.S.No.578 of 2009:

1. Whether the plaintiff is entitled to the relief of declaration as prayed for?
2. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?
3. Whether the Will dated 15.7.2005 is valid, legal and genuine? (end of the 8th page in the original)
4. What other reliefs the plaintiffs are entitled to?

12. In pursuant to the orders passed by this Court, the following additional issues were framed for trial:

1. Whether the Suit claim is properly valued?
2. Whether this Court has pecuniary jurisdiction to entertain the Suit?

13. During the course of trial, the 4th plaintiff examined herself as P.W.1 and Exs.A1 to A20 were marked. On behalf of the defendants, R.Subbae Gowder was examined as D.W.1 and the attesor of the Will was examined as D.W.2 and the Surveyor was examined as D.W.3 and Exs.B1 to B55 were marked.

14. The Trial Court, on consideration of the pleadings and on appreciation of oral and documentary evidence, found that the claim based on the Will cannot be sustained and as a consequence, held that the father of the plaintiffs and the defendant died intestate and as such, they are entitled to share in the suit property and accordingly passed a preliminary decree for partition and separate possession in O.S.No.744 of 2011 and dismissed the Suit in O.S.No.578 of 2009, vide common judgment and decree dated 30.07.2014.

15. The plaintiff in O.S.No.578 of 2009, who is the defendant in O.S.No.744 of 2011, aggrieved by the dismissal of the Suit and grant of preliminary decree, had filed an appeal in A.S.No.1 of 2015.

16. The Lower Appellate Court, on going through the memorandum of appeal, framed the following points for determination:

1. Whether the findings of the Trial Court is correct that the Will dated 15.07.2005 is not valid, legal and genuine?
2. Whether the appellant/defendant is correct to state that Suit is bad for partial partition?
3. Whether the plaintiffs had correctly valued the Suit claim and paid the Court Fees properly?
4. Whether the Trial Court has pecuniary jurisdiction to entertain the Suit?
5. Whether the appeal is to be allowed?

17. The Lower Appellate Court has noted the following suspicious circumstances in respect of the Will dated 15.07.2005, marked as Exs.B4.:

- (i) In the Will, it has been stated that Range Gowder is no more and whereas she was alive at the time of execution of the Will and no circumstance have been made out for excluding the other natural heirs.
- (ii) The evidence of one of the witness namely Dharmalingam cannot be believed as it is doubtful.

- (iii) Though it is alleged by the plaintiff in O.S.No.578 of 2009, who is the defendant in O.S.No.744 of 2011 that he has been intimidated, no complaint has been lodged whatsoever.
- (iv) Nine digit number given in respect of electricity service connection was not in vogue and the execution of the Will is also creating suspicious circumstance.
- (v) No recital has been made with regard to the ancestral property in the form of residential building in the Will.

18. Therefore, the Lower Appellate Court concurred with the conclusion reached by the Trial Court that Ex.B4 - Will is not true, genuine and valid document. Insofar as the claim of the plaintiff in O.S.No.744 of 2011 with regard to partition and separate possession, the Lower Appellate Court found that though a suggestion was made to P.W.1 with regard to availability of other ancestral properties and she has also deposed on those lines, no pleading to that effect has been stated in the written statement in the said Suit and therefore, the answer given by P.W.1 with regard to availability of ancestral property and non-inclusion of the same in the Suit cannot be fatal to the case. The Lower Appellate Court, citing the said reasons, has dismissed both the appeals, vide judgement and decree dated 06.07.2015 and thereby, concurred with the judgment and decree passed in O.S.Nos.744 of 2011 and 578 of 2009 rendered by the Trial Court.

19. The plaintiff in O.S.No.578 of 2009, who is the defendant in O.S.No.744 of 2011, namely R.Subbe Gowder, aggrieved by the dismissal of both these appeals, had filed these second appeals.

20. In S.A.No.92 of 2016, the following Substantial Questions of Law are raised in the Memorandum of the Grounds of Appeal:

1. Whether late Rangae Gowder had validly and genuinely executed the Will dated 15.07.2005, while being in sound disposing mind?
2. Whether the courts below properly appreciate the Will in terms of 63(c) of Indian Succession Act and Section 68 of Evidence Act?

3. Whether the Courts below are right in dismissing the suit contrary to the evidence let in by the parties?
4. Whether the Courts below is right when the defendant miserably failed to prove his case as envisaged in Section 101 of the Indian Evidence Act, 1872?

21. In S.A.No.94 of 2016, the following Substantial Questions of Law are raised in the Memorandum of the Grounds of Appeal:

1. Whether the Courts below are right in decreeing the Suit for partition without even proper pleading and evidence?
2. Whether the Courts below are right in decreeing the Suit when the plaintiff miserably failed to prove his case as envisaged in Section 101 of the Indian Evidence Act, 1872 ?
3. Whether the Courts below are right in decreeing the Suit contrary to the evidence let in by the parties?
4. Whether the Courts below are right in decreeing the Suit when the Suit is hit by partial partition?
5. Whether the late Rangae Gowder had validly and genuinely executed the Will dated 15.07.2005 while being in sound disposing mind?

22. Mr.N.Manoharan, learned counsel appearing for the appellant in both the appeals would vehemently contend that Ex.B4/Will has been proved by examining one of the attestors, namely D.W.2 and though it is the claim of the respondents in these appeals that they have also contributed their work in agricultural activities and moreover no materials whatsoever has been produced in the form of evidence. It is the further submission of the learned counsel appearing for the appellant that the 4th plaintiff in O.S.No.744 of 2011, who was examined as P.W.1 has admitted in her oral testimony as to the availability of other ancestral properties and admittedly, in the said suit, the said properties have not been included and therefore, the suit is bad for partial partition. It is also the submission of the learned counsel appearing for the appellant that the

plaintiffs in O.S.No.744 of 2011/respondents herein have to succeed or perish on their own pleadings and since they have failed to probablise their case coupled with the fact that the appellant herein have proved the truth and genuineness of Ex.B4/Will by examining D.W.2 and also produced revenue records, which also evidence that she is in possession of the Suit property and the Courts below had committed grave error in upholding the case of the respondents and prays for interference.

23. Per contra, Mr.C.Veeraragavan, learned counsel appearing for the respondents/deed holders would contend that admittedly, the Suit for partition in O.S.No.550 of 2009 was filed by them on 02.07.2009 and whereas the Suit for Declaration and other consequential reliefs in O.S.No.578 of 2009 was filed only on 30.09.2009 and even in the written statement filed in O.S.No.744 of 2011 or in the plaint in O.S.No.578 of 2009, the appellant did not plea as to the availability of other ancestral properties for partition and therefore, he cannot take advantage of the snap answer given by P.W.1 with regard to non-inclusion of other properties available for partition. It is the further submission of the learned counsel appearing for the respondents/deed holders that the trial Court as well as the Lower Appellate Court has enumerated in detail the suspicious circumstances surrounding Ex.B4 and also pointed out that his mother is not alive at the time of execution of will and whereas she was alive and the Courts below has also taken into consideration the nine digit number of electricity service connection given and at that point of time, it was not at all in existence and having noted the suspicious circumstances, which have not been cleared by the appellant and therefore, lower Appellate Court has rightly reached the conclusion that Rangae Gowder has died intestate and therefore, respondents are entitled to a preliminary decree for partition and prays for dismissal of these appeals with exemplary costs.

24. This Court paid its best attention to the rival submissions and also perused the entire materials placed before it and also the findings rendered by the Courts below.

25. The primordial submission made by the learned counsel appearing for the appellant is that the Will/Ex.B4 has been proved strictly in accordance with law and in the light of the admission made by the plaintiffs in O.S.No.744 of 2011 with regard to availability of other ancestral properties for partition, the conclusion reached by the Trial Court warrants interference.

26. This Court, after hearing the rival submissions and on going through the reasons assigned by the Courts below, is of the considered opinion that these appeals lacks merit and are liable to be dismissed for the following reasons.

27. The Trial Court, in paragraphs 23 to 25, had enumerated with regard to suspicious nature of Ex.B4/Will and concluded that it is not true, genuine and unenforceable in law and as a consequence, the plaintiffs are entitled for a preliminary decree for partition and other consequential reliefs. The Lower Appellate Court, in paragraph 19 of the judgment, has enumerated 10 suspicious circumstances under which the said document/Will came into being and concurred with the findings rendered by the Trial Court as regards Ex.B4. Insofar as the claim for partition made by the respondents, the Courts below had concluded that once the claim of the appellant based on the Will came to be rejected, as a natural corollary, it shall be presumed that the father of the appellant as well as the respondents died intestate and as such, they are entitled for partition and separate possession as prayed for.

28. The learned counsel appearing for the appellant also made a valiant attempt and tried to convince this Court with regard to the answer given by P.W.1 as to the availability of other ancestral properties for partition and would contend that non-inclusion of all the items available for partition is bad for partial partition and on that ground, the impugned judgment and decree passed by the Courts below warrants interference. As rightly contended by the learned counsel appearing for the respondents that the Suit for partition came to be filed at the earliest point of time and the appellant, who is arrayed as the defendant did not take any stand with regard to the non-inclusion of other properties available for partition and even in the plaint in O.S.No.578 of 2009, he did not raise the said plea. The answer given by P.W.1 is only a snap answer and the Trial Court has recorded a finding that the non-inclusion of properties for partition is a mixed question of fact and law and in the absence of any plea, it cannot be taken into consideration.

29. In the considered opinion of the Court, the findings recorded by the Courts below are in consonance with the well settled legal principles.

30. This Court, on an independent application of mind to the entire materials placed before it, is of the considered opinion that the findings rendered by the Courts below are based upon appreciation of oral and documentary evidence in proper perspective and also in consonance with the well settled legal principles. Therefore, the impugned judgment and decree passed by the Courts below warrants interference.

31. In the result, both the Second Appeals are dismissed, confirming the judgment and decree dated 06.07.2015 made in A.S.Nos.1 and 2 of 2015 on the file of the I Additional District Judge, Coimbatore, in confirming the judgment and decree dated 30.07.2014 made in O.S.Nos.578 of 2009 and 744 of 2011 on the file of the Principal Subordinate Judge, Coimbatore. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

jvm/rka

To

1.The I Additional District Judge,
Coimbatore.

2.The Principal Subordinate Judge,
Coimbatore.

+1cc to Mr.S.Vinothkumar, Advocate Sr.42409

+2cc to M/S. C.Veeraraghavan, Advocate Sr.41754 & 41753

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srg 03/07/2017