

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.10.2017

PRONOUNCED ON : 06.11.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.Nos.620 & 621 of 2001

S.A.No.620 of 2001

S.V.Palanivelu Appellant/Appellant/Defendant

Vs.

S.V.Gandhimathi Respondent/Respondent/Plaintiff

S.A.No.621 of 2001

S.V.Palanivelu Appellant/Appellant/Plaintiff

Vs.

1. S.V.Gandhimathi

2. Durai @ S.N.Krishnaswamy

.... Respondents/Respondents/Defendants

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 02.11.1999 made in A.S.Nos.35 & 36 of 1999 on the file of the I Additional District Judge cum Chief Judicial Magistrate Court, Coimbatore confirming the judgment and decree dated 20.08.1998 made in O.S.Nos.2205 of 1996 & 187 of 1989 on the file of the II Additional District Munsif Court, Coimbatore.

For Appellant : Mr.R.Mukundan
in both appeals for M/s.Sarvabhauman Associates

For Respondents : Mr.C.R.Prasannan
in both appeals

COMMON JUDGMENT

S.A.No.620 of 2001

Second Appeal No.620 of 2001 is directed against the Judgment and decree dated 02.11.1999 made in A.S.No.35 of 1999 on the file of the I Additional District Judge -cum- Chief Judicial Magistrate, Coimbatore, confirming the judgment and decree dated 20.08.1998 made in O.S.Nos.2205 of 1996 on the file of the II Additional District Munsif Court, Coimbatore.

2. S.A.No.621 of 2001

Second Appeal 621 of 2001 is directed against the judgment and decree dated 02.11.1999 passed in A.S.No.36 of 1999 on the file of the I Additional District Judge cum Chief Judicial Magistrate, Coimbatore, confirming the judgment and decree dated 20.08.1998 passed in O.S.No.187 of 1989 on the file of the II Additional District Munsif Court, Coimbatore.

3. O.S.No.2205 of 1996 has been laid by the respondent for partition.

4. O.S.No.187 of 1989 has been laid by the appellant for permanent injunction.

5. The case of the appellant in both lis, in brief, is that S.V.Venkatrama Naicker, who is the father of the appellant and respondent, is the absolute owner of the suit properties by acquiring the same under the partition deed dated 21.12.1962 and before his death on 21.11.1986, he left behind a registered Will dated 20.08.1986 bequeathing the suit properties in favour of the appellant and in such circumstances, the first respondent, who is the sister of the appellant, has no right, title or interest in the suit properties and not entitled to claim any share in the suit properties and the suit properties are in possession and enjoyment of the appellant and it is only the appellant, who has been enjoying the suit properties as the absolute and full owner thereof and inasmuch as the respondent, without any entitlement, put forth a claim of share in the suit properties filed a suit in O.S.No.2205 of 1996 and also attempting to interfere with the possession and enjoyment of the appellant in respect of the suit properties, according to the appellant, he has been necessitated to lay the suit for permanent injunction in O.S.No.187 of 1989 and hence, prayed for the decreeing of the above said suit and dismissal of the partition suit laid by the respondent in O.S.No.2205 of 1996.

6. The case of the first respondent, in brief, is that she and the appellant are the children of Venkatrama Naicker, who died on 21.11.1986 leaving behind all the schedule mentioned properties and it is only the first respondent, who has been living with her father Venkatrama Naicker till his death and

enjoying the suit properties along with her father till his death and as per her knowledge, Venkatrama Naicker had not executed any document much less a Will bequeathing the suit properties in favour of the appellant and it is further stated that the alleged Will projected by the appellant is a fraudulent document created by him for the purpose of grabbing the suit properties entirely and the appellant had been living with his family separately at Kuniamuthur and not with his father Venkatrama Naicker and Venkatrama Naicker also refused to live with the appellant during his life time and the suit properties are the self-acquired properties of Venkatrama Naicker and as such, the first respondent is entitled to $\frac{1}{2}$ share in the suit properties and it is only the first respondent /plaintiff and her husband, who had been enjoying the suit properties by paying necessary charges etc., and hence, the suit for partition.

7. It is further found that the first respondent and her husband had laid another suit in O.S.No.1829/1991 against the appellant and others for permanent injunction claiming that the suit properties are in their possession and enjoyment and that, the appellant is unlawfully attempting to interfere with their possession and enjoyment of the same. The said suit has also been contested by the appellant by raising the above pleas and sought for the dismissal of the said suit. It is seen that all the above three suits were jointly tried and accordingly, common evidence has been recorded in all the three suits.

8. In support of the case of the respondents, the first respondent has been examined as PW1 and Exs.A1 to A6 have come to be marked in support of her case. On the side of the appellant, DWS1 to 3 were examined and Exs.B1 to B21 were marked.

9. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to hold that the first respondent is entitled to claim $\frac{1}{4}$ share in respect of the suit properties excepting the third item of the suit properties and accordingly, granted preliminary decree in favour of the first respondent. Further, the trial Court, accordingly, granted the relief of permanent injunction in favour of the first respondent and her husband as sought for in O.S.No.1829 of 1991 till the shares are settled between the parties as above determined. The trial Court dismissed the suit in O.S.No.187 of 1989 preferred by the appellant. Impugning the above said judgment and decree of the trial Court, it is seen that the appellant has preferred the appeals only as against the judgments and decrees passed in O.S.No.2205 of 1996 and O.S.No.187 of 1989.

10. The appellant has not preferred any appeal as against the judgment and decree passed in O.S.No.1829 of 1991

independently. The First Appellate Court also, on a consideration of the materials placed, accepted the case of the respondents and accordingly, confirmed the judgment and decree of the trial court in all aspects. Impugning the same, the present second appeals have been preferred.

11. The appellant and the first respondent are the children of Venkatrama Naicker. Claiming $\frac{1}{2}$ share in the suit properties, on the footing that the suit properties are the self-acquired properties of Venkatrama Naicker, the first respondent has levied the suit in O.S.No.2205 of 1996. Resisting the above case of the first respondent and the claim of the first respondent that the suit properties are the self-acquired properties of Venkatrama Naicker and contending that the suit properties are the joint family properties of Venkatrama Naicker and further pleading that Venkatrama Naicker had left behind a Will bequeathing the suit properties in favour of the appellant, the appellant sought for the dismissal of the partition suit preferred by the first respondent and prayed for decreeing of the suit for permanent injunction laid by him in O.S.No.187 of 1989. Both the parties claiming that the suit properties are in their respective possession and enjoyment and accordingly, sought for appropriate reliefs also.

12. On the materials placed, it is seen that the trial Court has given a finding that the suit properties are the joint family properties of Venkatrama Naicker. As regards the above said finding of the trial Court, the counsel for the respondents did not place any submissions and accepted that the said finding cannot be disturbed as such. It is thus found that the parties have come to a conclusion that the suit properties are the joint family properties of Venkatrama Naicker. Based upon the above finding, it is seen that the Courts below have accordingly held that the first respondent is entitled to $\frac{1}{4}$ share in the suit properties, except the third item and accordingly, granted appropriate reliefs in favour of the first respondent. The Courts below have negated the relief of partition sought for by the first respondent as regards the third item of the suit properties on the mere fact that the third item of the suit properties is the house property and hence, the daughter viz., the first respondent is not entitled to claim partition in the house property till the respondent opts to claim partition in the same.

13. The appellant had resisted the claim of the partition sought for by the plaintiff/first respondent, mainly, by projecting his case that Venkatrama Naicker had bequeathed the suit properties in his favour by way of a Will dated 20.08.1986 and hence, the first respondent viz., his sister is not entitled to claim any partition in the suit properties. The said Will,

according to the first respondent, was not executed by Venkatrama Naicker and the same had been concocted by the appellant for the purpose of this case. The said Will has come to be marked as Ex.B20. Inasmuch as Ex.B20 Will has come to be challenged by the first respondent, it is seen that the appellant, who propounds the above said Will to be a true document is bound to establish its genuineness and authenticity as mandated under law.

14. It is not in dispute that the deceased Venkatrama Naicker had been in possession and enjoyment of the suit properties till his demise on 21.11.1986. It is the specific case of the first respondent that she along with her family had been living with her father Venkatrama Naicker and enjoying the suit properties and as Venkatrama Naicker was not having good terms with the appellant, it is her case that the appellant had been living separately at Kuniamuthur and not with Venkatrama Naicker and thus, he has not been enjoying the suit properties in any manner and therefore, his claim that he is in possession and enjoyment of the suit properties, as such, should not be believed. It is found that the Courts below, on a consideration of the materials placed particularly the documents marked as Exs.A1 to A4 and also A6, found that it is only the plaintiff/first respondent and his family members, who had been all along residing with Venkatrama Naicker till his demise in the suit properties. Further, the Courts below have noted that the appellant has not placed any material, as such, worthwhile acceptance to hold that he has been in possession and enjoyment of the suit properties along with his father till the demise of his father and hence, did not place acceptance on the tax receipts marked as Exs.B5 to B16 and the other documents pressed into service by him and accordingly, held that he has failed to establish that he is in possession and enjoyment of the suit properties along with his father till the death of his father and accordingly, it is seen that the Courts below have negatived the relief sought for by the appellant in O.S.No.187 of 1989. It is now, therefore, seen that on the materials placed, the above findings of the Courts below could not be disturbed in any manner and it is thus found that it is only the first respondent, who had been in possession and enjoyment of the suit properties along with her father till his demise and continue to be in possession and enjoyment of the same and hence, the case of the appellant that he has been in separate possession and enjoyment of the suit properties, as such cannot be accepted in any manner.

15. Now, as seen above, the only defence projected by the appellant for discountenancing the plea of partition put forth by the first respondent is the Will marked as Ex.B20 said to

have been executed by his father Venkatrama Naicker. As above referred to, the said Will has been seriously challenged by the first respondent. To establish the authenticity of the above said Will, the appellant has chosen to examine the attesor of the Will as DW2. Now, according to the appellant, the father Venkatrama Naicker was hale and healthy till his last date and accordingly, with a free and clear mind, out of his own volition, had bequeathed the suit properties in his favour under Ex.B20 Will. However, according to the first respondent, Venkatrama Naicker was not hale and healthy and he was suffering from cancer and bedridden and unable to walk and almost become immobile and taking only liquid food for his sustenance and therefore, the Will projected as Ex.B20 is not a true Will and had not been executed by Venkatrama Naicker and the same had been concocted for the purpose of this case. As above seen, it is found that Venkatrama Naicker had been living in the suit properties along with his daughter, namely, the first respondent. In this connection, it is pleaded by the appellant that inasmuch as the first respondent was given in marriage by providing good seer, Venkatrama Naicker had thought it fit to bequeath the suit properties in his favour and therefore, no exception could be taken in the decision of Venkatrama Naicker to exonerate his daughter and bequeath the entire suit properties in his favour viz., only son/plaintiff. However, as rightly put forth by the first respondent, when the deceased Venkatrama Naicker was not having good relationship with the appellant during his lifetime and when it is found that he had been living only with the first respondent till his demise in the suit properties and the said facts have not been controverted by the appellant placing acceptable materials, it is seen that the case of the appellant that Venkatrama Naicker had chosen to disinherit his only daughter, who had been residing with him and looking after him, bequeathed all the suit properties in favour of his strained son, the appellant cannot be readily accepted. In this connection, the attesor examined as DW2 has accepted that Venkatrama Naicker had been residing only with his daughter and having good relationship with his daughter and that, the relationship between the appellant and Venkatrama Naicker being sour and not cordial, it is found that there is no necessity for the deceased Venkatrama Naicker to exclude his only daughter and bequeath the entire suit properties in favour of his son viz., the appellant.

16. The attesor examined as DW2 has admitted that he is closely associated with the appellant and knew Venkatrama Naicker only to a limited extent. It is thus found that the attesor DW2 is not well known to the deceased Venkatrama Naicker. When it is admitted that Venkatrama Naicker was suffering from cancer and had been confined to his house becoming immobile and taking only liquid food for his

sustenance, the case of the appellant that Venkatrama Naicker had chosen to bequeath his entire suit properties in favour of the appellant by executing a Will and also made arrangements to prepare and register the Will as projected by the appellant cannot be readily accepted. It is found that the scribe of the alleged Will Ex.B20 Sethupathi is not a resident of the local Village, where the suit properties are located, and living at Kunniyamuthur, where the appellant had been residing. It is further seen that DW2 has not deposed as to under what circumstances and when Venkatrama Naicker had solicited the assistance of the scribe Sethupathi and the other attester of the document Ex.B20 and in this connection, his evidence is very silent. When Venkatrama Naicker is admittedly suffering from the ailment of cancer and unable to move and confined in his residence and taking only liquid food, the case of the appellant that it is only Venkatrama Naicker, who had made all the arrangements for the preparation and registration of the Will in question as such cannot be easily accepted. It is seen that according to DW2, the Will Ex.B20 had come to be executed at the residence of Venkatrama Naicker situated in Singanallur. It is further seen that the scribe of the document Sethupathi is a resident of Kunniyamuthur Village. The said fact has not been disputed. It is further seen that according to DW2, the registered document writers are available at Singanallur. It is not the case of the appellant that the scribe Sethupathi is known to Venkatrama Naicker during his life time. In such circumstances, if really, Venkatrama Naicker had intended to convey the suit properties in favour of his son viz., the appellant, as rightly argued, he would have taken the assistance of a known scribe instead of soliciting the assistance of an unknown scribe, who is residing in a far-off place and not also known to him closely. It is further seen that it has not been established as to how and in what manner Venkatrama Naicker had solicited the assistance and the presence of the other attester to the document Ex.B20. Therefore, taking into aspects, the above state of affairs, the Courts below have rightly disbelieved the authenticity and genuineness of the Will projected in this case and held that the suspicious circumstances surrounding the same have not been properly dispelled by the appellant.

17. The Will Ex.B20 has come to be registered according to the case of the appellant. It is seen that according to DW2, the testator Venkatrama Naicker had directed that the Will should be registered on the next day. When it has been admitted that Venkatrama Naicker had been suffering from the ailment of cancer and consequently, his health having become spoiled and deteriorated to a considerable extent, resulting in his immobilment and when the fact remains that he has been taking only liquid food, if really Ex.B20 Will had been executed by

Venkatrama Naicker, it is noted that as rightly argued, Venkatrama Naicker would have endeavoured to register the Will immediately on the execution of the Will. However, according to DW2, Venkatrama Naicker had directed that the Will should be registered on the following day. Now, according to the case of the appellant, though the Will had been executed by Venkatrama Naicker at Singanallur and the Registrar Office is available within a short distance of Singanallur itself, according to the case of the appellant, the Will has come to be registered at Rajaveethi, which is very far away from Singanallur i.e. The Registrar Office at which the Will has come to be registered is admitted to be six miles away from Singanallur, where the alleged Will is stated to have been executed by Venkatrama Naicker. When the health condition of Venkatrama Naicker is such that he has become immobile and taking only liquid food, the case of the appellant that he had chosen to register the Will at Rajaveedhi and not at Singanallur is found to be highly unbelievable and far-fetched. Further, it has not been explained and properly established as to how and in what manner, Venkatrama Naicker had been taken to the Registrar office at Rajaveedhi and it has not been further explained as to who had made arrangement for bringing the witness at the time of registration on the next day as projected by the appellant. However, as rightly found by the Courts below, when according to DW2, the testator Venkatrama Naicker had directed that the Will should be registered on the next day, the fact remains that the Will Ex.B20 has been registered on the same day of its execution. It is thus found that the evidence of DW2 that Venkatrama Naicker had directed the Will in question to be registered on the next day is a false version and could not be accepted in any manner. Therefore, it is found that inasmuch as Ex.B20 Will had not been at all executed by Venkatrama Naicker as projected by the appellant and as deposed by DW2, it is seen that he is unable to place the correct facts in the course of his case and been tendering evidence contrary to the facts on ground. Further, according to DW2, the Will had come to be registered between 10 & 11 a.m. However, it has not been specifically deposed by him as to at what time the Will had come to be executed by Venkatrama Naicker. In such circumstances, when the Will in question is stated to be executed by a person, who is admittedly not in good health, immobile person and only taking liquid food and therefore, the further case that he has suo-motu made all the arrangements to prepare the Will to solicit the scribe and the witness for the said purpose, as such cannot be readily accepted. That apart, as seen above, when it is not in dispute that Venkatrama Naicker had good and cordial relationship with his daughter viz. the first respondent and admittedly, when he was having strained relationship with the appellant his only son, it is found that when admittedly on account of the above said relationship between the parties, the

appellant had been residing elsewhere separately and when the case of the appellant that despite the above position, Venkatrama Naicker had chosen to relieve his daughter and bequeath the entire suit properties in his favour, as such cannot be readily and easily accepted. Therefore, it is found that as rightly held by the Courts below, the Will in question Ex.B20 is beset with all the suspicious circumstances and in such view of the matter, when the suspicious circumstances surrounding and encircling the Will had not been properly dispelled by the appellant, who propounds the Will, it is found that the Courts below have rightly, based upon the facts and legal principles, chosen to discredit the said Will and rightly held that the Will in question has been concocted and fabricated by the appellant for the purpose of the case. Accordingly, it is found that the Courts below rightly held that EX.B20 is not a true document and the appellant had failed to establish the same to be a true and genuine document.

18. However, it is argued by the appellant's counsel that even assuming for the sake of arguments, that Venkatrama Naicker had been affected by cancer as such, when it has not been established that he had feeble mental capacity to execute the Will in question, the Courts below had erred in rejecting the Will based upon the alleged suspicious circumstances, which do not at all exist and hence, the judgment and decree of the Courts below should be set aside. However, when the materials placed disclosed that Venkatrama Naicker was seriously affected by a chronic disease and thereby, unable to move and taking only liquid food, his condition can be visualized that he could not have executed the Will in question on his free Will and volition and particularly, when he had been living with his only daughter, who had showered all the love and affection towards him and his relationship with the appellant, the only son, being not good and strained, the case of the appellant, despite the above factors, Venkatrama Naicker had chosen to exonerate his daughter and bequeath all the suit properties in his favour cannot be accepted in any manner. That apart, as to mode of the execution of the Will and the Registration thereof, considering the evidence adduced in the matter through the mouth of DW2 and the appellant DW1, it is found that the Will in question could not have been really executed by the deceased Venkatrama Naicker as put forth by the appellant and accordingly, it is found that the Courts below have rightly rejected the Will Ex.B20 and held that the same is not a true document. No exception could be taken to the findings of the Courts below as regards the validity of the Will and in such view of the matter, it is seen that the Courts below have rightly held that the Will Ex.B20 had not been established to be a genuine document in the manner known to law and taking into account, all the circumstances

surrounding the same, as determined by them, are found to be suspicious in nature and further, holding that inasmuch as the appellant had failed to dispel the same through proper and reliable evidence, it is found that the mere factum of registration of the Will alone would not render the Will in question as a genuine document and therefore, it is seen that the substantial questions of law formulated in this second appeal should be answered only against the appellant and in favour of the first respondent.

19. The Courts below have declined the relief of partition claimed by the first respondent in respect of the third item of the suit properties as the same is the house property. However, as rightly contended by the first respondent's counsel, considering the effect of the Amendment Act 39/05 deleting Section 23 from the Hindu Succession Act, though the above said amendment was prospective in nature, considering the present appeal proceedings as a continuation of the suit proceedings, it could be seen that the first respondent would be entitled to claim her due share to which she is entitled to in respect of the house property also viz., the third item of the suit properties and further, it is found that even though the respondent has not chosen to prefer any separate appeal as against the above said findings of the Courts below still it is open to the respondent to challenge the above said findings of the Courts below in the present proceedings and this Court could also grant appropriate relief if the respondent is entitled to claim partition in the said item as per Order 41 Rule 22 read with Order 41 Rule 33 of the Code of Civil Procedure and considering the authorities put forth by the respondents' counsel, with reference to the same reported in 2011 (3) CTC 433 (Govindaraj Vs. Ramadoss), 2011 (3) MWN (Civil) 769 and 2009 (2) CTC 130 (M.Revathi Vs. R.Alamelu and 6 others), it is found that the respondent is entitled to seek $\frac{1}{4}$ share in the house property also i.e. the third item of the suit properties and therefore, in such view of the matter, the findings of the courts below that the respondent is not entitled to any share in the third item of the suit properties till the respondent chose to claim partition in respect of the same, as such cannot be allowed to sustain any further. It is therefore held that the respondent is entitled to claim $\frac{1}{4}$ share in the third item also along with the other items of the suit properties and accordingly, necessary relief should be granted in favour of the respondent.

20. In the light of the above discussions, the judgment and decree of the Courts below are modified only to the extent that the respondent is also entitled to claim $\frac{1}{4}$ share in the third item of the suit properties and in other aspects, the judgment

and decree of the courts below are confirmed and resultantly, the second appeals are dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

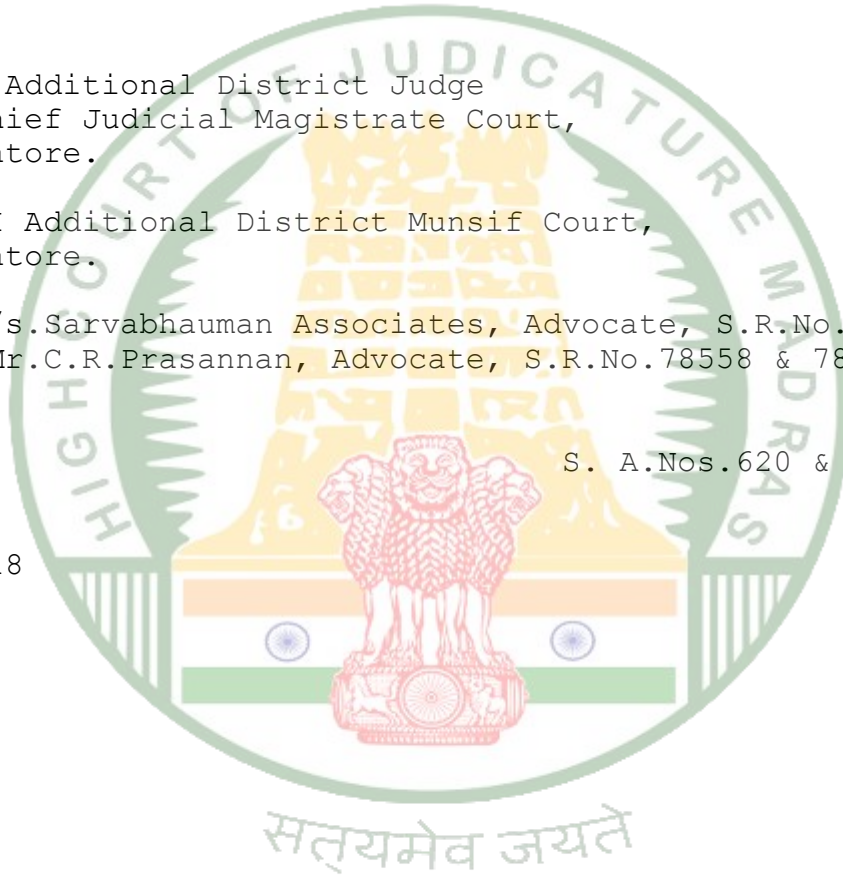
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To

1. The I Additional District Judge cum Chief Judicial Magistrate Court, Coimbatore.
2. The II Additional District Munsif Court, Coimbatore.

+1cc to M/s.Sarvabhauman Associates, Advocate, S.R.No.78200
+2ccs to Mr.C.R.Prasannan, Advocate, S.R.No.78558 & 78559

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