



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 27.06.2017

PRONOUNCED ON : 30.08.2017

WEB COPY

CORAM:

**THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN**

AS (MD) No.25 of 2014  
CMP (MD) No.12128 of 2016

S.Narayanan

..Appellant/2<sup>nd</sup> Defendant

Vs

1.V.Meenakshi  
2.M.Saraswathi  
3.A.Indira  
4.S.Mariappan  
5.H.Zaheer Hussain  
6.M.Karunakaran

...Respondents 1 to 3/Plaintiffs

...Respondents 4 to 6/Defendants 1,3&4

Prayer:- This Appeal Suit is filed against the judgement and decree dated 5.1.2013 made in OS.No.232 of 2010 on the file of the IV Additional District Judge, Madurai.

For Appellant : Mr.C.Sundaravadivel

For Respondents : Mr.K.P.Narayanakumar-RR1to3  
No Appearance for R5

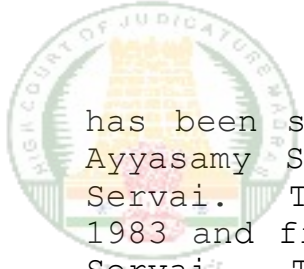
#### JUDGEMENT

This appeal suit has been filed by the 2nd Defendant in OS.No.232 of 2010 on the file of the IV Additional District Court, Madurai, aggrieved by the judgement and decree dated 5.1.2013.

2. The suit had been filed by the three Plaintiffs, namely, V.Meenakshi, M.Saraswathi and A.Indira, who are all sisters, seeking partition and separate possession of 1/5<sup>th</sup> undivided share to each one of the Plaintiffs and for a direction against the Defendants 1 and 2 to pay future mesne profits from the date of the plaint till the date of realisation and for costs.

3. In the plaint Schedule, there were two items of suit properties. Item (1) is the land and building in Door No.202, TS.No.783/1 and 783/2, Old Ward No.4, New Ward No.13, Madurai Town and Item (2) is the land and building in Door No.200, in TS.No.783/5, Madurai Town.

4. As stated above, the Plaintiffs are sisters. The 1st Defendant, S.Mariappan, and the 2nd Defendant, S.Narayanan are brothers. The 3rd Defendant, H.Zakeer Hussain and the 4th Defendant, M.Karunakaran are the tenants in the suit properties. It



has been stated that the suit property originally belonged to one Ayyasamy Servai, who had two sons, Sangaiah Servai and Balusamy Servai. There was a partition suit between them in OS.No.430 of 1983 and finally, the suit properties had been allotted to Sangaiah Servai. The wife of Sangaiah Servai died 13 years prior to the filing of the suit and Sangaiah Servai died on 14.9.2010. The Plaintiffs and the Defendants 1 and 2 are his legal representatives. The Plaintiffs claimed that the 2nd Defendant is trying to alienate the suit properties. In such circumstances, claiming their individual 1/5<sup>th</sup> undivided share, the Plaintiffs have filed the suit.

5. The 2nd Defendant has filed his written statement. According to him, the father, Sangaiah Servai had executed a will dated 5.12.2001, bequeathing his properties to him. Consequently, he claimed that both the suit properties devolved on to him through the will and therefore, stated that the suit should be dismissed.

6. The Defendants 3 and 4, who are the tenants, had also filed a written statement. They stated that they are the tenants in the suit properties. According to them, the 2nd Defendant had been receiving the monthly rents. They claimed that they cannot be evicted except under due process of law. The 1st Defendant had filed a written statement and did not participate during the trial proceedings and he was set exparte.

7. On consideration of the pleadings, the court below had framed the following issues for trial:-

1. Whether Sangaiah Servai executed a registered will in favour of the 2nd Defendant on 5.12.2001?
2. Whether the Plaintiffs valued the suit property and proper court fee paid?
3. Whether the plaint is bad for mis joinder and non joinder of proper and necessary parties?
4. Whether the Plaintiffs are entitled to 1/5<sup>th</sup> share and for mesne profits from the Defendants 1 and 2?
5. To what further relief the parties are entitled to?

8. During the trial, the 1<sup>st</sup> Plaintiff was examined as PW.1 and she marked Ex.A1 to Ex.A4. Ex.A2 is the death certificate of Sangaiah Servai. Ex.A2 is the legal heirship certificate. Ex.A3 dated 12.6.1985 is the copy of partition deed. Ex.A4 is the copy of election identity card. On the side of the Defendants, three witnesses were examined. The 2nd Defendant, S.Narayanan was examined as DW.1 and two independent witnesses, S.M.Kamaludheen and Rajamani were examined as DW.2 and DW.3. The Defendants marked Ex.B1 to Ex.B12. Ex.B1 dated 16.3.1950 is the copy of the will and Ex.P2 dated 4.4.1962 is the settlement deed in favour of the Sangaiah Servai. Ex.B3 is the death certificate of Nallammal and Ex.B4 dated 5.12.2001 is the will executed by Sangaiah Servai. Ex.B5 to Ex.B9 are the revenue documents and Ex.B10 to Ex.B12 are the marriage invitation cards of the three Plaintiffs.



9. On consideration of the oral and documentary evidence, the Trial Court had held that the suit properties were ancestral in nature and it was further held that the will of Sangaiah Servai dated 5.12.2001, marked as Ex.B4 had been proved in accordance with law. The Trial Court further held that since Sangaiah Servai died on 14.09.2010, as seen from Ex.A1, death certificate, and during the intervening period in 2005, the Succession Act had been amended bringing about the shares in ancestral property to the daughters of a family. Consequently, the Trial Court found that the Sangaiah Servai's will, which came into effect on his death on 14.09.2010, was operative only with respect to 1/6<sup>th</sup> share. The Trial Court further found that as on the date of death of Sangaiah Servai, the three Plaintiffs and the two Defendants and Sangaiah Servai were entitled to undivided 1/6<sup>th</sup> share. Consequently, the Trial Court had granted a judgement and decree in favour of the Plaintiffs for an individual 1/6<sup>th</sup> undivided share each and held that the 1st Defendant was also entitled to an undivided 1/6<sup>th</sup> share and the 2nd Defendant was entitled to an undivided 2/6<sup>th</sup> share in the suit properties. With respect to the future mesne profits, the Trial Court had held that the Plaintiffs were at liberty to proceed under Order 20 Rule 12 of CPC. The suit was dismissed as against the Defendants 3 and 4. As against the said judgement and decree, the 1st Defendant had filed the present appeal.

10. This court heard the learned counsel on either side and also perused the materials placed on record.

11. The main issue, which arises for consideration in the appeal is whether the will dated 5.12.2001, marked as Ex.B4, executed by Sangaiah Servai, the father of the Plaintiffs and the Defendants 1 and 2, but which came into operation on his death on 14.09.2010, will have the force of bequeathing the suit properties on the 2nd Defendant in entirety or whether the will can be operative only with respect to the share of Sangaiah Servai as on the date of his death.

12. Both the learned counsel contended that the will marked as Ex.B4 had been proved in accordance with law. They also admitted that both the suit properties were ancestral properties. The will was executed on 5.12.2001. Sangaiah Servai died on 14.09.2010.

13. In 2009 4 CTC 440 (K.V.Ramasamy Vs. K.V.Raghavan and others) B, this court had held that after the enactment of the Hindu Succession Act, 1956 as amended by Act 39 of 2005, the daughters are to be treated equally as coparceners along with the sons. Consequently, in this case, when the Act came into force and when the will was not produced or revealed, the three Plaintiffs and the Defendants 1 and 2 and their father Sangaiah Servai became entitled to an undivided 1/6<sup>th</sup> share in the suit properties.

14. In this connection, Section 2(h) of the Indian Succession Act, 1925 defines 'will' as "the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death." It is pertinent to point out that through a will, a person can bequeath only his properties. This naturally means that if an ancestral

property is bequeathed, the will can take effect only with respect to the share of the testator in the said property. In this case, Section 6 of the Hindu Succession Act, had been amended in 2005. Subsequent to the said amendment, Section 6 of the Hindu Succession Act reads as follows:-

"6. Devolution of interest in coparcenary property:- (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,-

a. by birth become a coparcener in her own right in the same manner as the son.

b. have the same rights in the coparcenary property as she would have had if she had been a son.

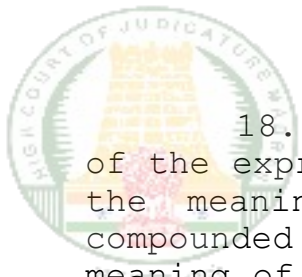
c. be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20<sup>th</sup> day of December 2004."

15. In this connection, the learned counsel for the Appellant has stated that since there has been a testamentary disposition of the property even prior to the amendment of the Hindu Succession Act and since the will Ex.B4 had been proved in accordance with law, the property must devolve only to the Appellant in accordance with the will. In this connection, the point, which arises for determination, is whether mere execution of a will prior to the amendment of Hindu Succession Act was sufficient to make the will come within purview of expression, 'testamentary disposition', particularly, since the testator died much later only on 25.11.2012.

16. A careful look at Section 6(1) would show that by the amendment brought forth by Central Act No.39/2005, the daughter of a coparcener in a joint Hindu family governed by the Mitakshara law was made a coparcener by birth, in the same manner as the son and was vested with the same rights and obligations in respect of the coparcenary property, as a son would have. But the proviso to sub-section (1) makes it clear that nothing therein would affect or invalidate any disposition or alienation including any partition or testamentary disposition which had taken place before 20.12.2004.

17. Two expressions appearing in the proviso to sub-section (1) of Section 6 are of significance. They are (1) disposition and (2) alienation. These two expressions are followed by a rider to the effect that any partition or testamentary disposition is also included within the purview of these two expressions.



18. While there is no difficulty in understanding the purport of the expression alienation, there is some difficulty in expounding the meaning of the expression disposition. This difficulty is compounded by the inclusion of testamentary disposition, within the meaning of the expression disposition. Normally one would understand the expression testamentary disposition to mean the execution of a testamentary instrument, the bequest under which is to take effect in future, while alienation takes place in praesenti. Therefore the confusion or difficulty posed by the proviso to Section 6(1) is as to whether it includes a testamentary disposition that has come into effect due to the death of the testator before the crucial date or a bequest which has not yet come into effect, due to the testator being alive as on the crucial date.

19. The question as to whether, the Hindu Succession (Amendment) Act, 2005 will have retrospective effect or not, has been answered by the Supreme Court in *Prakash v. Phulavat* (2016)2 SCC 36. The Supreme Court held therein that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters were born. The Supreme Court further held that disposition or alienation including partition, which may have taken place before 20.12.2004 as per the law applicable prior to the said date, will remain unaffected.

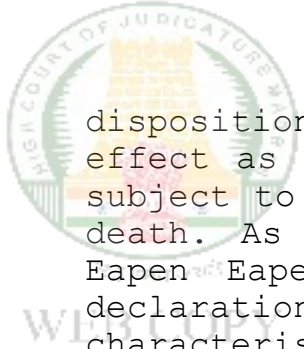
20. In *Pavitri Devi v. Darbari Singh*, (1993) 4 SCC 392, the Supreme Court referred to the expression 'testamentary disposition' appearing in Section 30 (1) and went into the scope and ambit of the said expression in paragraph 3. Paragraph-3 of the said decision reads as follows:

Webster in 'Comprehensive' Dictionary in international edition at page 1298, stated the meaning of the word 'testamentary' thus: (i) derived from, bequeathed by, or set forth in a will; (ii) appointed or provided by, or done in accordance with, a will; (iii) pertaining to a will, or to the administration or settlement of a will, testamental. In the Law Lexicon by P. Ramanatha Aiyar, reprint edition 1987 at P. 1271 testamentary instrument was defined to mean a "testamentary instrument" is one which declares the present will of the maker as to the disposal of his property after death, without attempting to declare or create any rights therein prior to such event. Black's Law Dictionary [6th Ed. 1991] defines "testamentary disposition" at page 1475 thus - "the passing of property to another upon the death of the owner. A disposition of property by way of a gift, Will or deed which is not to take effect unless the grantor dies or until that event." Section 123 of the Transfer of Property Act provides disposition by a gift which takes effect even during the lifetime of the donor and effective as soon as it is registered and normally given possession of the property therein. Section 30 of the Act is merely declaratory of the law not only as it stood before the Act, but as it now stands modified by the



provisions of the Act. It declares that any Hindu may dispose of by a will or other testamentary disposition his property or interest in coparcenary which is capable of being so disposed of by him in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force applicable to the Hindus. Its explanation is really material. The testamentary disposition, therefore, would mean disposition of the property which would take effect after the death, instead of co-instentine on the execution of the document. A testamentary disposition is generally effected by a will or by a codicil which means an instrument made in relation to a will extending, altering or adding to its disposition and is to be deemed to form part of the will. Will as defined in Section 2(h) of the Indian Succession Act, 1925 means legal declaration of the intention of the testator with respect to his property which he desired to carry into effect after his demise. It limits alienation intra vivos. While the gift being a disposition in presenting, it becomes effective on due execution and registration and generally delivery of the possession. Section 30 makes it clear that testamentary disposition under the Act would be dealt with in accordance with the Indian Succession Act. Section 55 and Schedule 3 of the said Act prescribe procedure effecting succession amongst Hindus by testamentary succession by will or codicil. Section 30 employs non-obstinate clause and excludes from the operation of pre-existing or any other law applicable to coparcenary property governed by Mitakshara law and introduced fiction in its explanation and empowers the Hindu male or female to dispose of his or her interest by a will or any other testamentary disposition known to law-which would be effective after the demise. It would, therefore, be difficult to envisage that disposition by gift partakes the character of testamentary succession under Section 30 of the Act.

21. However, the Honourable Supreme Court was concerned in Pavitri Devi with a gift deed and not a Will. A gift is actually a transfer of property, while a Will is not. By its very nature, a testamentary disposition is one which does not take effect and which does not become final, unless and until the testator dies. It is not only the bequest under a Will, which is subject to various uncertainties, dependent upon the life and wish of the testator, but even the right of the testator to bequeath a particular property may undergo a change before he dies. Take for instance a case where the testator begets a child after the execution of Will. If his undivided share in the joint family property had been the subject matter of the Will, his own share may undergo a change with the birth of a son after the execution of the Will. In peculiar cases it may even happen with the birth of a sibling to the testator. Therefore, a testamentary disposition can never be an actual



disposition in the true sense of the term, since its coming into effect as well as the extent to which it takes effect, are always subject to the uncertainties of time and mind, apart from birth and death. As pointed out by the Supreme court in Mathai Samuel Vs. Eapen Eapen {(2012) 13 SCC 80}, a Will is merely a legal declaration of the testators intention and its essential characteristic is its ambulatoriness and revocability.

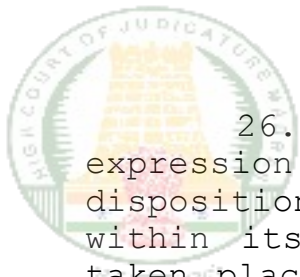
22. Unfortunately, the word disposition itself emerged from the English language and law and hence the manner in which law dictionaries have expounded the term, is in tune more with linguistics than with law. This is perhaps why the Supreme court pointed out in Goli Eswariah vs. Commissioner of Gift Tax {AIR 1970 SC 1722} that the word disposition is not a term of law, having a precise meaning and that its meaning has to be gathered from the context in which it is used.

23. Blacks Law Dictionary defines disposition to mean the fact of transferring something to anothers care or possession especially by deed or will; the relinquishing of property. The same dictionary defines testamentary disposition to mean a disposition to take effect upon the death of the person making it, who retains substantially entire control of the property until death. P. Ramanatha Aiyars the Law Lexicon (3<sup>rd</sup> Edition 2012) deals with the definition of the word disposition in a variety of circumstances. One of the several connotations given in the Law Lexicon is as follow:

The word disposition in relation to property means disposition made by deed or will and also disposition made by or under a decree or under order of a Court as the qualifying phrase used in Section 21(2), viz., including any transfer in execution of a decree or order of a Court, Tribunal or authority (Sanjay v. State of Maharashtra AIR 1986 SC 414).

24. The right of a Hindu to dispose of his property by will or other testamentary disposition is recognised by Section 30 of the Hindu Succession Act. It is that in Section 30, the expression testamentary disposition is used. A careful look at the manner in which Section 30 is worded would show two things, viz., - a) that a testamentary disposition could be either by way of will or otherwise; and b) that what is sought to be done through will or other testamentary disposition is considered by Section 30 to be a disposal.

25. Interestingly the Oxford English Dictionary defines the word, whenever used as a noun in the branch of law, to mean the distribution or transfer of property or money to someone especially by bequest. The origin and etymology of the word disposition, as indicated in Merriam Webster Dictionary shows that the word evolved in the 14th century from the Latin word Disposition and from the word disponere. Though no disposition or disposal or distribution of property takes place at the time of execution of the Will, the word disposition has come to be associated even with testamentary



26. But the Proviso to section 6(1) does not merely use the expression testamentary disposition. It starts with the word disposition, then proceeds to include testamentary disposition within its ambit and then qualifies it with the words which had taken place. Therefore, we think that the proviso to Section 6(1) has to be split into 3 parts

(i) the first part containing the words disposition or alienation

(ii) the second part containing the words including any partition or testamentary disposition and

(iii) the third part containing the words which had taken place before 20-12-2004.

27. Therefore, if a case is to be brought within the purview of the proviso to section 6(1), especially in relation to a Will, 2 things are to be proved namely (i) that there was a valid Will and (ii) that the disposition under the Will had taken place before the date specified. The disposition under a Will would take place only when the testator dies and not otherwise. This is not only due to the very nature of testamentary disposition but also due to the fact that during the period between the date of execution of the Will and the date of death of the testator, many things may happen, even beyond the control of the testator, that would make the bequest invalid, wholly or partially. Therefore, the expression testamentary disposition appearing in the proviso to section 6(1) should be understood to mean only a Will which had taken come into effect before 20-12 2004. The words which had taken place should be understood to mean which had taken effect.

28. There is one clue available in Section 6 itself, for anyone to come to the same conclusion as we have. It is in sub-section (5) and the Explanation following the same. Sub-section (5) of section 6 and the Explanation following the same, read as follows:

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation: For the purposes of this section partition means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a Court.

29. While the proviso under sub-section (1) of section 6 excludes from the operation of sub-section (1), any alienation or disposition, including any partition or testamentary disposition that has taken place before the appointed day, sub-section (5) excludes from the operation of section 6 in entirety, a partition made by a registered deed or a partition effected by a decree of court. It is important to note that the proviso to sub-section (1) is confined in its applicability to sub-section (1). In contrast,

the prescription contained in sub-section (5) and the Explanation thereunder, are applicable to the entirety of section 6.

30. The prescription contained in sub-section (5) and the Explanation following the same, give a clear indication to the fact that the law makers did not want parties to plead oral partition effected before the appointed day, for the purpose of defeating the right created by the Amendment Act. An oral partition or a Memorandum recording past partition, had always been accepted by courts, subject to proof. But the Explanation to section 6, makes it clear that unless a partition had been effected by a registered deed or by a decree of court, the benefit of sub-section (5) may not be available.

31. It is needless to point out that in a partition, mutual transfers take place in presenti. Even then, the benefit of sub-section (5) will not be available unless the partition had been effected by a registered deed or a decree of court. Therefore, the intention of the law makers is very clear to the effect that no one should be allowed to create documents, after the advent of the Amendment Act of 2005, to defeat the rights conferred by the amendment. In order to prevent the creation of ante dated documents, the Amendment ensures that even reliance upon such documents is impermissible. In such circumstances, if the expression testamentary disposition is taken to mean the mere execution of a Will, the rights conferred by section 6 can be easily defeated by parties by setting up a Will, which is not required to be compulsorily registered.

32. Therefore, I am of the considered view that in cases where the testator was alive as on 20-12-2004, the Will, even if any executed by him genuinely before the said date, would not make it a case of testamentary disposition which had taken place, so as to make the case fall under the proviso and to take it out of the application of section 6(1). In other words, a case will fall under the proviso to section 6(1), only if 2 things had taken place before 20-12-2004 namely (i) execution of a Will and (ii) the death of the testator. The execution of the Will before 20-12-2004 alone is not sufficient to take a case out of the operation of section 6(1), as no disposition under the Will would have taken place, if the testator was alive. As pointed by the Supreme court in S.Rathinam vs. Mariappan {AIR 2007 SC 2134}, a Will of a man is the aggregate of his testamentary intentions manifested in writing and is not a transfer.

33. In the present case, it is seen that Sangaiah Servai died only on 14.09.2010. On that date, he had an undivided  $1/6^{\text{th}}$  share in the suit properties. By the definition of 'will' he could bequeath only his property, which naturally means that he could only bequeath  $1/6^{\text{th}}$  undivided share. Consequently, the Appellant, who already has an existing  $1/6^{\text{th}}$  share, would be entitled to an additional  $1/6^{\text{th}}$  share in view of the bequeath made by his father Sangaiah Servai through Ex.B4. In such circumstances, the Appellant herein would be entitled to an undivided  $2/6^{\text{th}}$  share and the respondents 1 to 3, who are the Plaintiffs would be entitled to only  $1/6^{\text{th}}$  share each in the suit properties. Similarly, the 4th



Respondent, who was the 1st Defendant in the suit, would also be entitled to an undivided 1/6<sup>th</sup> share. This naturally means that the judgement and decree appealed against this does not warrant any interference since the Trial Court had also granted an undivided 1/6<sup>th</sup> share to each one of the Plaintiffs.

WEB COPY

34. In the result, this appeal suit is dismissed. With respect to the mesne profits, I also hold as held by the Trial Court that the Plaintiffs 1 to 3 are at liberty to proceed under Order 20 Rule 12 of CPC. No costs. Consequently, the connected MP is closed. No costs.

Sd/-

Assistant Registrar(RTI)

/True Copy/

Sub-Assistant Registrar

To:

The IV Additional District Judge,  
Madurai.

+One cc to Mr.K.P.Narayanakumar, Advocate, SR.No.76073

Srcm

RL/3C/10P/KP/SAR1/17/11/2017

Judgement in  
AS (MD) No.25 of 2014  
CMP (MD) No.12128 of 2016

30.08.2017