



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.08.2017

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

SECOND APPEAL (MD) No.351 of 2017

and

C.M.P (MD) No.7512 of 2017

1.Rethinavathi

2.William Raj

... Appellants/Appellants/Defendants 8 & 9

Vs.

1.Edward Alexander

2.Rajappan

3.Victor

4.Robert

5.Ruby

6.Arul Raj (died)

7.Chandrakantha

8.Balammal

9.Arputharaj

10.Victor

11.Rajariga Ruba

12.Vijila

13.Edwin

14.Austin

15.Balu

16.Yesudhasan (died)

17.Joseph Savari Raj

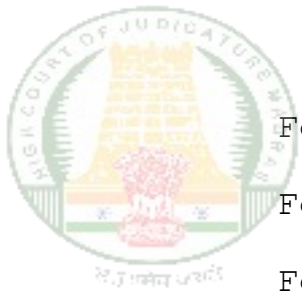
18.Annal Glory Bai

... Respondents 2 to 18/Respondents 2 to 17/
Defendants 1 to 7, 10 to 15 & 16 to 18

(RR 1, 6 and 7 were brought on record as legal representatives of the deceased 16th respondent vide order, dated 02.02.2017 made in C.M.P (MD) No.11240 of 2016)

(R - 18 is brought on record as legal representatives of the deceased 6th respondent vide order, dated 03.10.2016 made in C.M.P (MD) No.3446 of 2016)

PRAYER: Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and Decree, dated 11.07.2009 made in A.S.No.64 of 2007 on the file of the Principal Sub-Court, Nagercoil, modifying the Judgment and Decree, dated 17.10.2006 made in O.S.No.328 of 2000 on the file of the Principal District Munsif, Nagercoil.



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For Appellant	: Mr.K.Sree Kumaran Nair
For R - 1	: Mr.D.Nalla Thambi
For R - 17	: Mr.P.Sivathilakar
For R - 18	: Mr.A.George Stephen Kanikkai Raj

JUDGMENT

The defendants 8 and 9, who are the appellants herein, have filed the above Second Appeal against the Judgment and Decree, dated 11.07.2009 passed in A.S.No.64 of 2007, on the file of the Principal Sub-Court, Nagercoil, modifying the Judgment and Decree, dated 17.10.2006 passed in O.S.No.328 of 2000, on the file of the Principal District Munsif, Nagercoil.

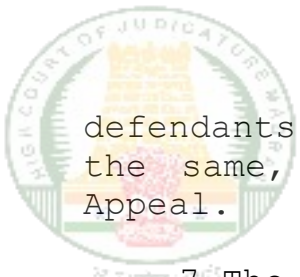
2.The plaintiff filed the suit in O.S.No.328 of 2000, on the file of the Principal District Munsif, Nagercoil, for partition.

3.The case of the plaintiff is that the suit properties originally belonged to one Motchakkan, who is the grandfather of the plaintiff. The said Motchakkan had five daughters and one son. Three daughters already died. The plaintiff is the son of one of the daughters and the appellants herein are the heirs of the deceased son of Motchakkan. As the properties are self-acquired properties of their grand-father, the plaintiff has asked for 1/6th share of his mother, in which he is entitled to 1/3rd share along with his other siblings, therefore, the plaintiff is entitled to 1/18th share of the entire suit properties.

4.The suit was resisted by the defendants contending that the plaintiff is not entitled to any share, as Motchakkan had executed the registered Will under Document No.45 of 1986 during his life time. As per the said Will, the entire properties were bequeathed in favour of his son. After the death of Motchakkan, the Will came into force and the entire property devolved on the defendants 8 and 9. The 17th defendant, who is the father of the plaintiff, has filed the written statement claiming 1/6th share. It is also stated that earlier, a suit was filed in O.S.No.164 of 2004 and the same is said to be pending.

5.On the side of the plaintiff, P.W.1 to P.W.3 have been examined and Exs.A.1 and A.2 were marked and on the side of the defendants, D.W.1 has been examined and Exs.B.1 to B.6 were marked and Ex.X.1 has been marked.

6.The Courts below have concurrently held that the defendants have not proved the Will in the manner known to law. Though the <https://hcservices.ecourts.gov.in/hcservices/> decreed the suit allotting 1/18th share in favour of the plaintiff, the first Appellate Court, on appeal by the



defendants 8 and 9, modified the same as 1/24th share. Aggrieved by the same, the defendants 8 and 9 have filed the above Second Appeal.

7. The learned counsel appearing for the appellants contended that the original owner Motchakkan had executed Ex.B.4-Will, which is a registered one in favour of his son conveying all the suit properties. Therefore, there is nothing available for partition, as claimed by the plaintiff. Secondly, it was contended that there was a suit in O.S.No.332 of 2001 filed by the plaintiff on the file of the Additional District Munsif, challenging the genuineness of Ex.B.4-Will. The said suit was dismissed for default. Therefore, the plaintiff is precluded from filing the present suit.

8. So far as the first contention of the learned counsel for the appellants is concerned, though it is a registered Will, dated 03.04.1986, it should be proved in the manner known to law when there is a dispute. It is contended that one of the attestors is still alive. However, there is no valid reason forthcoming as to why the attesor was not examined for proving the Will. In the absence of proof of Will in the manner known to law, the Will cannot be admitted in evidence.

9. The second contention is that the present suit is barred by the principles stated in Order 9 Rule 9 C.P.C. It is the case of the appellants that the suit in O.S.No.332 of 2001 filed by the plaintiff challenging the validity of the Will-Ex.B.4 was dismissed for default, therefore, the second suit is not maintainable by the plaintiff. However, it is to be seen that the present suit is one for partition and the cause of action was different from the earlier suit. It is only the duty of the defendants, who are the propounder of the Will, to prove the validity of the same. Therefore, the question of bar of the suit under Order 9 Rule 9 C.P.C., and the principles of *res-judicata* will not arise.

10. In the absence of any proof with regard to validity of the Will, the property would devolve upon the heirs by natural inheritance. The lower Appellate Court has rightly passed the preliminary decree. The Appellate Judgment was passed on 11.07.2009 and in the absence of any stay order, it is stated that the final decree proceedings have progressed and final decree is about to be passed next week. In such circumstances, this Court feels that in the absence of any question of law, the Second Appeal cannot be entertained and the same is dismissed in the admission stage itself. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-II)



To

1.The Principal Sub Judge,
Nagercoil.

2.The Principal District Munsif,
Nagercoil.

3.The Record Keeper,
V.R Section,
Madurai Bench of Madras High Court,
Madurai.

+1cc to M/S.D.NALLATHAMBI, Advocate SR.No.72745

+1cc to M/S.K.SREEKUMARANNAIR, Advocate SR.No.72501

ps

JS/MR-KKR/SAR1:22.09.2017:4P-6C

S.A(MD)No.351 of 2017
16.08.2017