

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 16.07.2018

CORAM

THE HONOURABLE MR. JUSTICE N.SESHASAYEE

C.M.A. No.2712 of 2015

1.Arulappan
2.Adaikalasamy

.. Appellants

versus

Selvaroyar (Died)
1.Salaman Royar
2.Pavul Royar
3.Yovan @ Arulappan
4.Singaroyar
5.Arputhamary
6.Selvamary
7.Anasooya Mary
8.Arul Mary
9.Minor Royappa Royar
10.Minor Pasthan Mary

.. Respondents

(Minor respondents 10 and 11 are
rep. by their next friend mother,
guardian of 9th respondent)

Appeal filed under Order 43 Rule 1(u) of the code of Civil
Procedure against the judgment and decree dated 19.06.2015 made
in A.S.No.4/2013 on the file of the Principal District Judge,
Ariyalur remanding the judgment and decree dated 23.12.1993 made
in O.S. No.55 of 1985 on the file of the District Munsif Court,
Jayankondam.

For appellants : Mr.Mukunth for
M/s.Sarvabhauman Associates

For respondents : Mr.Parthasarathy,
Senior Counsel for
Mr.P.Dinesh Kumar for R1
No appearance for
R2 to R7, R9 and R10

JUDGMENT

An ability of the human mind to contrive difficulty for its existence and compromise on the peace that they are entitled to, is demonstrated in this case.

2. A block of agricultural land measuring 2.28 acres described in the two schedules in the plaint belonged to Arulappa Padayachi. There is no dispute. He had three daughters and a son, of whom, this Court is now concerned with two characters: His only son Rayappan and one of the daughters Agnisammal. Rayappan had two sons, namely Selvarayar and Singarayar. Agnisammal had a daughter Ulaganayagi. Singarayar is referred to now has married his niece, Ulaganayagi, through whom the plaintiffs were born.

3. The suit property was under a possessory mortgage of the year 1935 to one Namasivaya Mudaliar, who had assigned it in favour of Agnisammal. In these circumstances, Selvarayar, the elder son of Rayappan had laid a suit for redemption in O.S.No.970/1972 before the District Munsif Court, Ariyalur. This suit was decreed on 30.04.1972. Challenging the said decree, the assignee cum mortgagee and aunt of Selvarayar, Agnisammal had preferred an Appeal in A.S.No.609 of 1974 before the Sub Court, Trichy. The First Appellate Court set aside the decree of the trial Court and remanded the matter back to the trial Court with a direction to the plaintiff to amend the plaint and to seek partition of the property as well. This was done, whereupon on 10.08.1977, the trial Court decreed the suit yet again. In the preliminary decree for partition, the trial Court had granted Selvarayar 5/8 share and the three daughters of Arulappa Padayachi were given 1/8 share.

4. Aggrieved by this decree, Selvarayar preferred A.S.No.57 of 1978, whereas Agnisammal had preferred A.S.No.60 of 1978. By a common judgment dated 21.09.1978, the Sub Court, Trichy reduced the share allotted to Selvarayar from 5/8 to 1/4 and granted Agnisammal and her two sisters $\frac{1}{4}$ th share each. This decree was futilely challenged by Selvarayar in S.A.No.841 of 1979, which this Court dismissed on 21.10.1983.

5. Be that as it may, Agnisammal had executed a settlement deed dated 03.09.1967 in favour of her grand children born to her daughter and nephew Singarayar. After the dismissal of the Second Appeal before this Court, the settlees under the aforesaid settlement deed had come forward with the present suit in O.S.No.55 of 1985 before the District Munsif Court, Jayamkondam for declaration of title and for prohibitory injunction. The cause of action for the suit was pivoted in the settlement deed. This suit was decreed in-toto. Notwithstanding

the judgments in A.S.Nos.57 & 60 of 1978 on the file of Sub Court, Trichy, followed by the judgment of this Court in S.A.No.841 of 1979 (marked as Ex.A.17 to Ex.A.19), under which Agnisammal, the settlor and her sisters were given only $\frac{1}{4}$ shares each.

6.Challenging this decree, defendant Selvarayar and others had preferred a first appeal in A.S.No.68 of 1994 before the Sub Court, Ariyalur. In this, appellant (respondent herein) had taken out two interlocutory applications in I.A.Nos.252 of 2003 & 101 of 2011, both of which were filed under Order 41 Rule 27 of C.P.C r/w 151 C.P.C. Subsequently, on the establishment of District Court, Ariyalur, the cases were transferred to the said Court where the case was taken on file in A.S.No.4 of 2013. I.A.No.101 of 2011 was numbered as I.A.No.15 of 2013. Through these interlocutory applications, Selvarayar's son Solomon had produced a Will dated 25.10.1918 written by his great grand father Arulappa Padayachi in favour of his grand father Rayappan. The first appellate Court set aside the decree of the trial Court and remanded the matter back to the Trial Court to consider the Will propounded by Solomon Rayar.

7.Arguing for the appellants/plaintiffs, Mr.R.Krishna Prasad contended that :

- The Will now propounded by Solomon Rayar was produced by his father Selvarayar in the earlier set of litigations in O.S.No.970 of 1972 and during the trial, Selvarayar had given up his claim over the suit property based on the said Will. This fact has been recorded by the trial Court in its judgment, which was subsequently produced in the judgment of the First Appellate Court in A.S.No.57 of 1978 which is now marked as Ex.A.17. Here it is significant to indicate that Solomon Rayar was a party along with his father in the earlier set of litigations.
- Notwithstanding the fact that the Will that was given up in the earlier set of litigations, attempt is now made to give a new lease of life in the present proceedings, and this is impermissible in law. Secondly, the propounder of the Will has not shown a just cause as to why it was not produced during trial.

8.This Court broadly finds that neither side has conducted themselves fairly. Here is the plaintiff who knew that he could obtain no more than $\frac{1}{4}$ share in the suit property, has claimed title to the entire suit property. Here is the defendant who was a party in the earlier suits and who knew or at least ought to have known that the right flowing under a purported Will of Arulappa Padayachi which he was said to have executed in 1918, was ultimately given up.

9. Learned counsel for the first respondent would submit that in Ex.A1, settlement deed it is recited that the settlor became entitled to the property covered under the said settlement deed only to those properties which are excluded from the Will in favour of settlor's brother Rayappan. This would imply that there is an admission about the existence of a Will in favour of Rayappan, and that the only issue now under probe is whether the property that is now settled under Ex.A1 and a subject matter of the present litigation is included in the Will of Rayappan. Even de hors the same the respondents would be entitled to 1/4th share in the property and the appellants cannot claim the entire property. The Will in question is dated 25.10.1918 inasmuch as, it is an ancient document, Section 90 of the Evidence Act will step in to substitute the proof requires to be made under Section 68 of the Evidence Act. This even the first appellate Court can do. Secondly, whether the property included in Ex.A-1, settlement deed is part of the Will in question only requires a comparative reading of both the documents by the first appellate Court. Thirdly, as contended by the counsel for the appellant, if the Will can be pressed into service by the first respondent, is a question of law and this can be considered by the first appellate Court itself. Fourthly, in the absence of a Will or settlement deed, the parties would be co-sharers, and it would be a case for the Court to mould the relief to meet the situation.

10. These are all the four issues and that can be ancillary issues as well. For instance there is a pleading founded on adverse possession. For the reasons already stated, this Court does not consider that it was necessary for the first appellate Court to remand the matter to the trial Court.

11. This appeal is therefore allowed and the judgment and decree dated 19.06.2015 made in A.S. No.4/2013 on the file of the Principal District Judge, Ariyalur is set aside, and the First Appellate Court is directed to consider all aspects raised as appropriate points for consideration, and address them. If the first appellate Court considers it necessary to consider the Will in question (since the appellant resists it on grounds of waiver), it may record oral evidence to prove it by itself. Both the parties are directed to appear before the First Appellate Court on 01.08.2018.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

mrr/vga

To

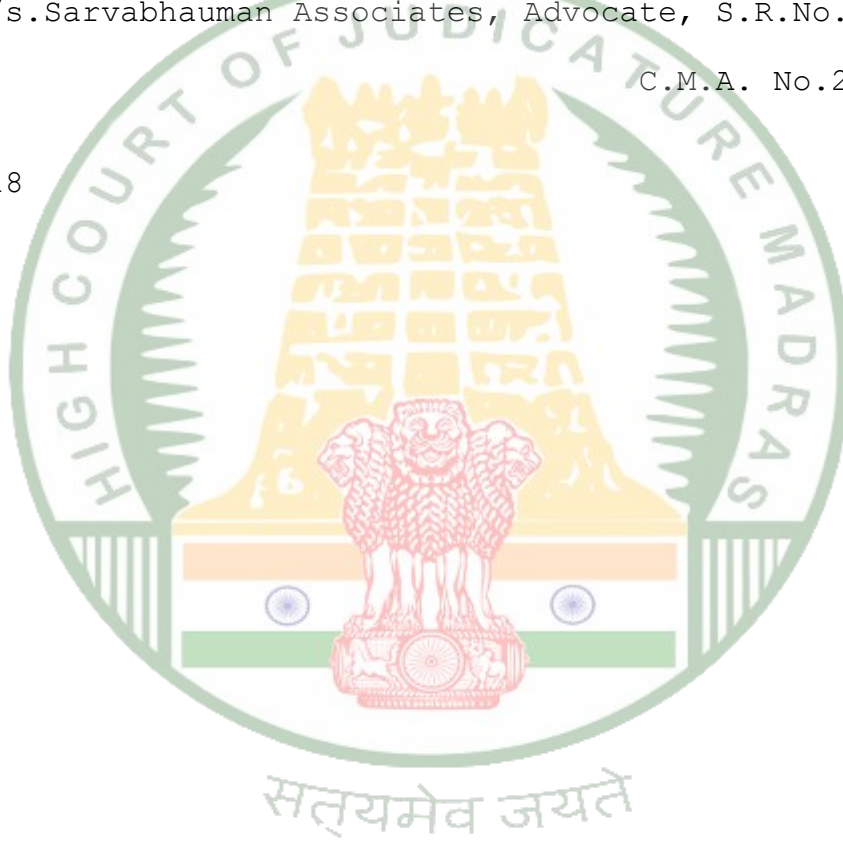
1. The Principal District Judge,
Ariyalur.
2. The District Munsif Court,
Jayankondam.
3. The Section Officer,
V.R.Section,
High Court, Madras. (2 Copies)

+1cc to Mr.K.A.Vimal Kumar, Advocate, S.R.No.46911

+1cc to M/s.Sarvabhauman Associates, Advocate, S.R.No.46512

C.M.A. No.2712 of 2015

AK(CO)
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