

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :23.03.2018

PRONOUNCED ON:12.04.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1365 of 2003  
and  
C.M.P.No.12167 of 2003

Perumal

.... Appellant

Vs.

- 1.Ramasamy (Deceased)
- 2.Rangasamy
- 3.Govindasamy
- 4.Subramanian
- 5.Karuppiah
- 6.Muthusamy
- 7.Panneerselvam

(RR4 and 5 represented by their  
power of attorney agent the  
2<sup>nd</sup> respondent herein)

8. Chinnapillai
9. Rasathi
- 10.Natarajan

[RR8 to R10 brought on record as  
LR's of the deceased R1 vide order  
of the Court dated 27/02/2018  
made in C.M.P.Nos.14801 to 14803  
of 2016 in S.A.No.1365 of 2003]

... Respondents

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 24.03.2003 rendered in A.S.No.77 of 1997 on the file of the Subordinate Judge, Namakkal, reversing the judgment and decree dated 28.06.1996 rendered in O.S.No.287 of 1993 on the file of the Principal District Munsif of Namakkal.

For Appellant

: Mr.S.Subbiah, SC  
for M/s.P.Raja

For RR2, R3, R4 and R5 : Mr.S.Sridhar

RR6 and R7 : No representation  
No appearance  
Set exparte  
Vide order dated 23.03.2018

RR8 to R10 : Set exparte  
Vide order dated 27.02.2018

#### J U D G M E N T

Challenge in this second appeal is made to the judgment and decree dated 24.03.2003 passed in A.S.No.77 of 1997 on the file of the Subordinate Court, Namakkal, reversing the judgment and decree dated 28.06.1996 passed in O.S.No.287 of 1993 on the file of the Principal District Munsif Court, Namakkal.

2. The parties are referred to as per the rankings in the trial court.

3. Suit for partition .

4.The case of the plaintiffs in brief is that the plaintiffs and the defendants excepting the second plaintiff are the grand children of Sanjeevi Naicker and the second plaintiff is the great grand son of Sanjeevi Naicker and the suit properties are the ancestral properties belonging to the plaintiffs and the defendants and accordingly, it is stated that Sanjeevi Naicker had six sons and each are entitled to 1/6<sup>th</sup> share in the ancestral properties left behind by Sanjeevi Naicker and the plaintiffs and the defendants being the legal heirs of the abovesaid sons of Sanjeevi Naicker, it is only the plaintiffs and the defendants, who are entitled to the suit properties as such and the plaintiffs 1,2,3 and the defendants 1 and 3 and the second defendant's mother Leelavathy excluding the plaintiffs 4 and 5 had nominally divided the suit lands located at Trichy district, by way of a partition deed dated 10.07.1991 and the said documents had been executed as a sham and nominal document without intending to give any legal effect to the same and therefore the said document cannot be deem to have been executed between the parties concerned for effecting the partition of the suit lands at Trichy by metes and bounds and on the other hand, the said properties are in the joint possession and enjoyment of the parties concerned though for convenient sake, they had been enjoying the properties separately and the other suit properties consisting of houses and sites located in Namakkal district also remain undivided and accordingly, it is the case of the

plaintiffs that they are entitled to their due share in the suit properties and on the other hand, as the third defendant attempted to alienate the suit properties without effecting the division of the suit properties and allotting the share to which the plaintiffs and the other sharers are entitled to, it is stated that the plaintiffs had been necessitated to lay the suit for appropriate reliefs.

5.The case of the third defendant in brief is that the suit laid by the plaintiffs is not maintainable either in law or on facts and it is false to state that the parties concerned had effected a sham and nominal document in respect of the lands at Trichy district, by way of a partition deed dated 10.07.1991 without intending to give a legal effect thereto and despite the same, are enjoying the said lands jointly however, enjoying the separate portions of the same for the sake of convenience and the abovesaid facts are stated by the plaintiffs only for the purpose of the case and the third defendant's father as well as his brothers Nallayan and Gopal as also the third defendant had left to Sri Lanka for eking out their livelihood about 60 years ago and of them, only the third defendant, and his father returned back to India in 1970 and as the legal heirs of Nallayan and Gopal had died in the Srilankan ethnic war, even prior to the return of the third defendant to India and accordingly, the remaining sharers at the instance of the mediators, divided the suit lands at Trichy, by way of a registered partition deed dated 10.07.1991 and the properties described in the first item of the plaint schedule i.e. the properties at Namakkal had already been orally divided amongst the sharers by allotting separate shares to them and accordingly, when the properties belonging to the parties had already been divided by allotting separate and independent shares to the parties concerned, the case of the plaintiffs that the plaintiffs 4 and 5 had given a power of attorney agent in favour of the second plaintiff is false and created for the purpose of this case and the plaintiffs 4 and 5 are not the legal heirs of the deceased Nallayan and Gopal and it is false to state that, the third defendant attempted to alienate the suit properties to deprive the share of the plaintiffs and the other sharers and inasmuch as the properties had been already divided by metes and bounds and the separate shares are enjoyed by each sharer, the present suit laid by the plaintiffs for partition is not maintainable and liable to be dismissed.

6.In so far as the suit laid by the plaintiffs seeking partition as against the defendants 1 to 3, it is seen that only the third defendant is contesting the plaintiffs' suit and the first defendant has submitted to the decree and the second defendant had remained exparte.

7.In support of the plaintiffs' case, P.Ws.1 to 4 were

examined. Exs.A1 to A10 were marked. On the side of the defendants, D.Ws.1 and 2 were examined. Exs.B1 to B6 were marked. Exs.C1 and C2 were also marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to dismiss the suit laid by the plaintiffs. On appeal, the first appellate court, on an appreciation of the materials placed, was pleased to set aside the judgment and decree of the trial court and by way of allowing the appeal preferred by the plaintiff, granted the preliminary decree for partition in favour of the plaintiff as prayed for. Aggrieved over the same, the present second appeal has been laid.

9. At the time of admission of the second appeal the following substantial questions of law were formulated for consideration.

(i) Whether the judgment of the lower appellate court is vitiated by reason of the failure to point out the mistake if committed by the Trial court.

(ii) When there is no admission by one party regarding the genuineness of the parties to the suit and when the status of the parties are under challenge, simply because there was no counter filed by the parties thereto for transposition, can the Court draw a presumption under Section 58 of Indian Evidence Act as against the person challenging it.

(iii) When a power of attorney was executed outside India, whether the presumption under Section 85 of the Indian Evidence Act is available on such a power of attorney.

(iv) When a notary had been defined as one appointed as the Notaries Act, 1952, can a notary appointed in a Foreign Country could be taken as a notary under the Notaries Act, 1952 so as to bring a presumption in favour of the document allegedly notarised by the said notary.

9. It is not in dispute that the suit properties originally belonged to Sanjeevi Naicker as his ancestral properties and also not in dispute that Sanjeevi Naicker had six sons and thus, it is found that each branch of Sanjeevi Naicker would be entitled to 1/6 share in the suit properties. It is also found that as admitted by the third defendant, the third defendant's father and the third defendant as well as Nallayan and Gopal,

the other two sons of Sanjeevi Naicker had left to Srilanka for eking out their livelihood and it is found that, according to the third defendant, only his father and he had returned back to India during 1970 and it is stated that the legal heirs of Nallayan and Gopal had died in the ethnic war at Sri lanka itself even prior to the said departure of the third defendant. It is thus seen that the two sons, Nallayan and Gopal had legal heirs and according to the case set out by the third defendant, they had died even prior to 1970 at Srilanka itself.

10. Now, it is the case of the plaintiffs that after the institution of the suit, the second plaintiff went to Sri lanka and accordingly, on apprising the institution of the partition suit, it is their case that the plaintiffs 4 and 5, who are the sons of Nallaiyan and Gopal respectively had given a power deed in favour of the second plaintiff to institute the suit or continue the suit for partition and also obtain their shares on their behalf and the said power deed had come to be marked as Ex.A1. Ex.A1 is being disputed by the third defendant by raising the defence that the same has been created by the plaintiffs for the purpose of this case and according to the third defendant, the legal heirs of Nallaiyan and Gopal had died long back and hence it is stated that Ex.A1 is only a concocted document.

11. Originally, the plaintiffs 1 to 3 had laid the suit against the defendants 1 to 3 as well as the plaintiffs 4 and 5. Later, on obtaining the power deed marked as Ex.A1, it is found that steps have been taken by the plaintiffs 1 to 3 to transpose the defendants 4 and 5 as the plaintiffs 4 and 5 and continue the suit and it is found that the application for transposition filed in I.A.No.726 of 1994 has come to be entertained by the trial court on 08.09.1995 and it is found that the said I.A has not been contested by the third defendant, in particular, the third defendant having not filed any counter in the said I.A and accordingly the transposition of the plaintiffs 4 and 5 being sought for only on the footing of the power deed executed by them, in favour of the second plaintiff, marked as Ex.A1 and when it is found that the main contestant, namely the third defendant having not resisted the said application, it is found that accordingly, the plaintiffs 4 and 5 have come to be transposed from the array of the defendants to the array of the plaintiffs and it is hence found that the case of the third defendant that the legal heirs of Nallaiya and Gopal had died long back and therefore the above power deed Ex.A1 could not have been executed by the legal heirs as such cannot be accepted. If that be so, when the transposition sought for in I.A.No.726 of 1994 has been made only on the strength of the power deed Ex.A1, if the abovesaid defence set out by the third defendant has any element of truth, the third defendant would

have opposed the transposition tooth and nail, by raising all sorts of resistance to ensure that the said application ends in dismissal. On the other hand, it is found that the third defendant having not put forth any resistance and thereby having admitted the case projected by the plaintiffs for transposition, it is seen that the present plea now raised by the third defendant in the suit that Ex.A1 is not a true document and the plaintiffs 4 and 5 are not the legal heirs of Nallaiya and Gopal as such cannot be accepted and rightly disbelieved by the first appellate court. The further plea raised by the third defendant that Nallaiya and Gopal had left behind only Gurusamy and Raju as their legal heirs and not the plaintiffs 4 and 5 also could not be accepted in any manner. Particularly, it is noted that, no such plea has been raised by them in specific, in the written statement and the same having been darted out by the third defendant for the first time only during the course of his evidence as rightly contended, no evidence without the foundation of the pleas could be accepted. It is seen that, accordingly, the abovesaid defence version projected by the third defendant and on that plea endeavoring to challenge the status of the plaintiffs' 4 and 5 as the legal heirs of Nallayan and Gopal had been rightly negatived by the first appellate court and it is thus found that, accordingly, the third defendant knowing that the alleged legal heirs namely Raju and Gurusamy are not in existence and only the plaintiffs 4 and 5 are the legal heirs of Nallyan and Gopal, did not endeavor to place any opposition to the transposition application filed in I.A.No.726 of 1994.

12.In addition to that as rightly put forth by the plaintiffs' counsel, the plaintiffs have vividly averred in the plaint about as to how they are entitled to claim the shares in the suit properties by tracing out their genealogy from the main tree i.e. Sanjeevi Naicker and accordingly, described that the plaintiffs 4 and 5 are the legal heirs of Nallaya and Gopal and thus entitled to claim shares in the suit properties. The foundation for claiming shares in the suit properties by the plaintiffs as well as the defendants in the suit properties has been set out by the plaintiffs in paras 1 to 5 of the plaint. The third defendant has not disputed the same in the written statement and as rightly put forth, the third defendant has admitted the allegations in paras 1 to 5 of the plaint and in particular, not disputed in specific the entitlement of the plaintiffs 4 and 5 to claim share in the suit properties as narrated in the plaint and in such view of the matter, when the pleas set out in the plaint had not been denied in specific by the third defendant as provided under Order 8 Rule 5 of the Code of Civil Procedure, it is seen that as rightly argued, the third defendant is deemed to have admitted the abovesaid pleas raised in the plaint and accordingly, it is also found that the third

defendant had not chosen to contest the transposition application preferred in I.A.No.726 of 1994. It is thus found that the third defendant cannot be allowed to contend any further that the plaintiffs 4 and 5 are not legal heirs of Nallyan and Gopal in the light of the aforesaid reasonings.

13.The suit properties are located both at Namakkal as well as Trichy. Now according to the third defendant, the properties at Namakkal had been orally divided amongst the sharers. However, as to when the said properties had come to be orally divided and in whose presence, the said partition took place and what were the properties allotted to each sharer available at that point of time etc., had not been set out in the written statement and further, the third defendant has also not established that, in particular, such and such portion of the parties at Namakkal had been allotted to the different sharers and accordingly, the respective sharers are in possession and enjoyment of their allotted shares. In such view of the matter, it is found that from the vague pleas set out in the written statement as regards the alleged oral partition of the properties at Namakkal, it is found that on the footing, we cannot conclude that the properties at Namakkal had been divided orally as put forth by the third defendant.

14.It is seen that without the plaintiffs 4 and 5, the other sharers had divided the lands at Trichy, by way of a partition deed dated 10.07.1991, marked as Ex.B3. Now, according to the plaintiffs, the said partition deed is a sham and nominal document not intended to be given legal effect to and according to them, as at that point of time, the legal heirs of Nallayan and Gopal were not available, accordingly, the parties had chosen to enter into the partition deed marked as Ex.B3 for the name sake without any legal intention to divide the properties by metes and bounds and accordingly, it is stated that the parties on the same date had also chosen to enter into an agreement amongst themselves that on the return of the legal heirs of Nallaya and Gopal, they should again revisit the partition effected by them, by way of Ex.B3 and in this connection, the agreement entered into between the parties concerned have come to be marked as Ex.A2. On a perusal of Ex.A2, it is seen that, the parties thereto had agreed that they would again revisit the partition effected by them, by way of Ex.B3 and divide the properties, by metes and bounds on the return of the legal heirs of Nallayan and Gopal. Though, some defence has been projected by the third defendant as, if he has not executed the agreement Ex.A2, the evidence adduced in the matter both oral and documentary would go to show clearly that the third defendant as well as the other sharers had executed the agreement marked as Ex.A2 and accordingly, agreed to partition the properties again by metes and bounds on the return

of the legal heirs of Nallayan and Gopal. The third defendant in fact, during the course of his evidence, has admitted that his signature is available in Ex.A2. However, he would plead that he does not know under what context his signature had been obtained therein. As above seen, Ex.B3 partition deed and Ex.A2 agreement had come to be executed on the same date. On the date of Ex.B3 partition deed, admittedly, the plaintiffs 4 and 5 were not in the scene. As the third defendant had been to Srilanka and when according to the third defendant, Nallayan and Gopal had left behind legal heirs and though it is pleaded by him that the said legal heirs had died, the fact remains that the legal heirs are available as above seen, i.e. they are the plaintiffs 4 and 5 and that the plaintiffs 4 and 5 have also been admitted to be the legal heirs of Nallayan and Gopal by the third defendant as above discussed, it is found that, as rightly put forth by the plaintiffs counsel, when admittedly the legal heirs of Nallayan and Gopal are also entitled to their shares in the suit properties, when it is found that Ex.B3 partition deed would not be binding on them and accordingly, ignoring the same, the plaintiffs 4 and 5 would be entitled to seek their shares in the suit properties to which they are entitled to. It is thus found that as rightly put forth, Ex.B3 partition deed would not be in any manner binding upon the plaintiffs 4 and 5 and they can ignore the same and seek the partition of the properties as the lawful shares of the suit properties. Accordingly, it is found that the available sharers on the date of Ex.B3, knowing fully well that the legal heirs of Nallayan and Gopal are alive at that point of time, resultantly, proceeded to enter into a agreement marked as Ex.A2 whereunder, they had agreed to revisit the partition effected by them, by way of Ex.B3 on the return of the legal heirs of Nallayan and Gopal and Ex.B3 seen in that context and particularly in the light of Ex.A2 agreement, not having been executed by all concerned and when it is further seen that the parties to Ex.B3 partition deed are also the parties to Ex.A2 agreement and both the document has been executed on the same date, in such view of the matter, as rightly put forth by the plaintiffs, Ex.B3 was not intended to be given legal effect to as such and accordingly, though the parties at that point of time had chosen to execute the said document amongst themselves, however with the understanding that the partition effected by way of same should be revisited once again, on the return of the legal heirs of Nallayan and Gopal and so viewed, it is found that Ex.B3 partition deed cannot be termed to be a legally effected partition deed amongst all the sharers concerned and particularly when the plaintiffs 4 and 5 are entitled to ignore Ex.B3 partition deed and seek the partition of the suit properties again for allotting their due shares and in such view of the matter, it is found that, as rightly determined by the first appellate court, the plaintiffs together would be entitled to seek partition of the suit

properties once again in the light of the agreement entered into between the parties, by way of Ex.A2 agreement and in the light of the entitlement of the plaintiffs 4 and 5 ignore Ex.B3 and seek the partition of their shares in the properties concerned. The reasonings of the first appellate court on the abovesaid footing for accepting the plaintiffs case do not warrant any interference in the matter.

15.As above seen, the resistance offered by the third defendant to the power deed marked as Ex.A1 cannot be legally countenanced as on that basis, the plaintiffs 4 and 5 have been arrayed from their rank of the defendants particularly, considering the nil resistance offered by the third defendant in connection with the same. The plaintiffs further in order to establish that the plaintiffs 4 and 5 are available and communicating for the second plaintiff have also chosen to mark the letters sent by them, which have come to be exhibited as Exs.A5 and A6 and that apart, the power deed also lends support to the plaintiffs' case that the same had been executed only by the plaintiffs 4 and 5 in favour of the second plaintiff. That at the relevant point of time, to establish that the second plaintiff had been to Srilanka, the plaintiffs have also marked the passport, boarding pass, Embarkation travel ticket etc., of the second defendant as Exs.A8 to A10 and from Ex.A8 to A10 coupled with Exs.A5 and A6 plus the power deed marked as Ex.A1, all would go to show in a clear manner that the plaintiffs 4 and 5 are available and accordingly, they had chosen to execute the power deed granting the necessary power to the second plaintiff to obtain the partition of their shares also in the suit properties and accordingly, on that basis, it is found that they had come to be arrayed as the plaintiffs 4 and 5 from their rank of the defendants and it is thus found that the plaintiffs have placed acceptable and reliable materials to sustain their case of partition and also the authenticity of the power deed Ex.A1.

16.The defence has also been put forth that the plaintiffs have not established that the power deed had been actually executed by the plaintiffs 4 and 5 in favour of the second plaintiff in the presence of the Notary Public. However, when it is found that, on a perusal of Ex.A1 power deed, the document has come to be executed by the plaintiffs 4 and 5 in favour of the second plaintiff in the presence of the Notary Public at Srilanka and the said Notary Public had also certified to that effect at the bottom of the power deed in a clear manner about the presence of the plaintiffs 4 and 5 and their execution of the power deed in favour of the second plaintiff at the relevant point of time and the execution of the document by the plaintiffs 4 and 5 knowing the contents of the same etc., would go to amply establish that the power deed has been executed in

the presence of a Notary Public as per law and accordingly, it is seen that the Courts below are justified in raising the presumption that Ex.A1 power deed is a duly executed power deed by the plaintiffs 4 and 5 in favour of the second plaintiff and the presumption invoked by the first appellate court as regards the same u/s.85 of the Indian Evidence Act, for the reasons afore stated, do not call for any interference as such and accordingly, it is seen that the materials placed on record go to establish that Ex.A1 power deed has been duly established to be executed by the plaintiffs 4 and 5 in favour of the second plaintiff in the presence of the Notary Public and accordingly, it is seen that the third defendant had also not contested the transposition application preferred by the plaintiffs based on the above said power deed and thus cumulatively seen, it is found that the plaintiffs have established the authenticity and genuineness of Ex.A1 power deed as per law and accordingly, it is seen that the first appellate court, is right in upholding Ex.A1 power deed and also raising the presumption as regards in the manner known to law. The presumption raised in respect of Ex.A1 power deed having not been discharged or rebutted by the third defendant in any manner, by placing acceptable and reliable materials and on the other hand, finding to have accepted the same by offering no resistance with reference to the same in the transposition application as above discussed and also not placing any other material to discredit the same, accordingly, it is seen that Ex.A1 power deed is a true and genuine document are binding upon one and all concerned. The plaintiffs have also established the revalidation of Ex.A1 Power deed through acceptable oral and documentary evidence.

17. In the light of the abovesaid reasonings, the first appellate court, on a proper appreciation of the materials placed on record finding that the judgment and decree of the trial court cannot be sustained as per law, for the reasons stated by it for negating the plaintiffs' case, accordingly and rightly set aside the judgment and decree of the trial court for the reasons projected by it and further accordingly finding that the third defendant has not thrown any challenge to the power deed projected by the plaintiffs in the transposition application as well as not challenging the status of the plaintiffs 4 and 5 as put forth by the plaintiffs in the plaint by denying the same in specific as required under law as above pointed out, justified in holding the case in favour of the plaintiffs, on the premise that the admitted facts need not be proved and also it is found that the lower appellate court is justified in raising the presumption as regards the power deed u/s.85 of the Indian Evidence Act and when there is no material placed by the third defendant to rebut the said presumption and when on a reading of the power deed marked as Ex.A1 as a whole, it is seen that the concerned Notary Public has clearly

certified at the foot of the power deed about the execution of the document in the presence of the parties concerned as per law, it is found that the first appellate court is justified in raising the presumption in favour of the document and for the reasons afore stated, the substantial questions of law formulated in the second appeal are accordingly answered in favour of the plaintiffs and against the defendants.

18.In the light of the abovesaid reasonings, the principles of law outlined in decisions relied upon by the defendant's counsel reported in 2014 (4)SCC 196 [Pratima Chowdhury Vs Kalpana Mukherjee and another] and 2008 (4) SCC 530 [Thiruvendadam Pillai Vs. Navaneethammal and another] are taken into consideration and followed as applicable and relevant to the case at hand.

19.In conclusion, the second appeal fails and is accordingly, dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-  
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

mfa

To

1. The Subordinate Judge,  
Subordinate Court,  
Namakkal.
2. The Principal District Munsif,  
Principal District Munsif Court,  
Namakkal.
3. The Section Officer,  
VR Section, High Court.

+1cc to M/s.Elizabeth Rani, Advocate, S.R.No.27428

S.A.No.1365 of 2003

ks(co)  
cs/11/06/18