

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.09.2019

PRONOUNCED ON : 23.10.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

A.S.No.272 of 2011

Neelambal ... Appellant

Vs.

1.Rajammal (Deceased)

(R1 died. R2 to R4 & R8 LRs of
deceased R1 recorded as per memo
dated 12.09.2019 vide order of Court
dated 18.09.2019)

2.Gandhimathi

3.Rani

4.Suseela

5.P.Parvathi

6.P.Muthukumar

7.S.Santhi

8.K.Rajendran

...

Respondents

(RR5 to 8 impleaded as party respondent
vide order of Court dt.06.06.2017 in CMP
No.6237 of 2017 in A.S.No.272/2011)

Prayer :- First Appeal has been filed under Section 96 of the
Civil Procedure Code against the Judgement and Decree dated
23.07.2009 passed in O.S.No.171 of 2008 on the file of the
Additional District Judge, Fast Track Court No.2, Salem.

For Appellant : Mr.P.Jagadeesan

For Respondent : Mr.S.Sivakumar
Nos.1 to 4

Respondent Nos.5 to 8: No appearance /
Set exparte vide order
dated 26.09.2019

JUDGMENT

Aggrieved over the Judgement and Decree dated 23.07.2009
passed in O.S.No.171 of 2008 on the file of the Additional
District Judge, Fast Track Court No.2, Salem, the plaintiff
has preferred the first appeal.

2.For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3.Suit for partition.

4.The case of the plaintiff in brief is that she is one of the daughters of Kaliappa Goundar and Kaliappa Gounder had ancestral properties and he married one Rajammal, daughter of Periyasamy as his first wife and through the said wedlock, gave birth to one son by name Palanisamy and one daughter by name Neelambal, the plaintiff. During the subsistence of the marriage, Kaliappa Gounder married another Rajammal as his second wife, who is the first defendant and through the abovesaid wedlock, the first defendant gave birth to three daughters viz., the defendants 2 to 4 and one son by name Rajendran. After the second marriage, Kaliappa Gounder lived with both wives as one family. Kaliappa Gounder and his family members entered into a registered partition deed dated 26.05.1975 and in that partition, he gave the "B" schedule properties described therein to his son Palanisamy and the house described therein as the second item was given to the first wife Rajammal to be enjoyed by her during the life time without any right of alienation and to be taken by his son Palanisamy absolutely after the demise of his first wife. The first wife Rajammal is still alive and the first wife's son died on 29.10.2007 leaving a widow, two daughters and a son. The properties described in the "A" schedule in the abovesaid partition deed were retained by Kaliappa Gounder and his second wife. Another registered partition was effected between Kaliappa Gounder, his second wife and her son Rajendran on 12.11.1993 and the properties described in the "B" schedule properties in the abovesaid partition deed were allotted to his son Rajendran and the properties described in the "A" schedule properties in the abovesaid partition deed had been allotted to Kaliappa Gounder and his second wife. Kaliappa Gounder was living with his second wife and daughters born through the second wife and he did not care for the plaintiff nor spent any amount for the marriage of the plaintiff. The plaintiff's mother and her relatives celebrated the marriage of the plaintiff. Kaliappa Gounder spent for the marriage of his three daughters born through his second wife and also gave jewels and other gifts to them at the time of the marriage. Kaliappa Gounder deserted his first wife and the children born through her and he was hale and healthy till about five years prior to his death. Thereafter, he had an attack of diabetes and other complications and his second wife and her daughters persuaded him and made him execute a registered Will dated 30.09.1994 and the said Will is not a true Will and it is vitiated by coercion, undue influence and misrepresentation exercised by the second wife and her daughters. As per the said Will, he had bequeathed all his properties to his daughters and the second wife. The second wife was given a life estate and the properties should be taken absolutely by

the daughters, after the demise of the second wife. The abovesaid Will did not make any provision for the plaintiff, there is no reason for disinheriting the plaintiff. Hence, the Will is unenforceable and non est in the eyes of law and the plaintiff is entitled to partition in the suit properties and obtain $\frac{1}{4}$ share in the same and hence, the suit.

5.The defendants resisted the plaintiff's suit contending that the suit is not maintainable either in law or on facts. After the second marriage, Kaliappa Gounder lived only with his second wife and it is false to state that he lived jointly with his both wives. The defendants had not challenged the partition effected in the family of Kaliappa Gounder by way of the partition deeds dated 26.05.1975 and 12.11.1993. According to the defendants, the properties described in the "A" schedule in the partition deed dated 12.11.1993 had been retained by Kaliappa Gounder and therefore, he is entitled to dispose of the said properties as his wish and desire and the same cannot be questioned by the plaintiff. Kaliappa Gounder had been enjoying the properties described in the "A" schedule to the partition deed dated 12.11.1993 along with the defendants 1 to 4 and Kaliappa Gounder had celebrated the marriage of the plaintiff and it is false to state that he had not cared for the plaintiff and deserted her. Kaliappa Gounder died on 26.11.2002 and it is false to state that he was suffering from diabetes and other complications prior to his death. During the life time of Kaliappa Gounder in a fit state of mind and on his own volition, he had bequeathed the plaint schedule properties along with the first defendant in favour of his daughters viz., the defendants 2 to 4 by way of a Will dated 30.09.1994 which is a registered instrument and it is false to state that the abovesaid Will had been brought about by the defendants by exercising coercion, undue influence and misrepresentation and the allegations with reference to the same put forth by the plaintiff are false. Inasmuch as the properties belonging to Kaliappa Gounder had been bequeathed under the abovesaid Will, the plaintiff is not entitled to claim any share in the suit properties and the plaintiff has laid the present suit at the instigation of Rajendran, the brother of the defendants 2 to 4, who is not favourably disposed of towards the defendants and hence, according to the defendants, the suit laid by the plaintiff is liable to be dismissed.

6.On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the trial Court for determination:

"(a).Whether the plaintiff is entitled to obtain partition and separate possession of $\frac{1}{4}$ share in the plaint schedule properties as claimed in the plaint?

described in the "A" schedule of partition deed dated 26.05.1975 belonged to the plaintiff's father Kaliappa Gounder absolutely?

(c).Whether the Will executed by Kaliappa Gounder is true and valid?

(d).Whether Kaliappa Gounder is entitled to execute the abovesaid Will?

(e).To what relief the plaintiff is entitled to?

7.In support of the plaintiff's case, PW1 was examined and Exs.A1 & A2 were marked. On the side of the defendants, DWs1 & 2 were examined and Exs.B1 to B4 were 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 plaintiff's suit. Aggrieved over the judgment and decree of the trial Court, the plaintiff has preferred the present first appeal.

9.The following points arise for determination in this first appeal:

"(i).Whether the Will dated 30.09.1994 executed by Kaliappa Gounder is true, valid and binding on the plaintiff?

(ii).Whether the plaintiff is entitled to obtain partition and separate possession of $\frac{1}{4}$ share in the plaint schedule properties as claimed in the plaint?

(iii).To what relief the plaintiff/appellant is entitled to?

(iv).To what relief the defendants are entitled to?"

10.Point Nos.(i) & (ii)

It is not in dispute that the suit properties belonged to Kaliappa Gounder. It is also not in dispute that Kaliappa Gounder married one Rajammal, daughter of Periyasamy as his first wife and gave birth to one son by name Palanisamy and one daughter by name Neelambal, the plaintiff. It is also not in dispute that during the subsistence of the first marriage, Kaliappa Gounder had married the first defendant Rajammal as his second wife and through the first defendant, gave birth to three daughters viz., the defendants 2 to 4 and a son by name Rajendran. It is also not in dispute that a partition had been effected between Kaliappa Gounder and his family members in respect of the properties belonging to the family by way of a partition deed dated 26.05.1975 which

document has been marked as Ex.A1. As per Ex.A1 partition deed, it is found that the properties described in the "B" schedule to the abovesaid partition deed had been allotted to his son Palanisamy born through his first wife and the house described therein was to be enjoyed by his first wife Rajammal during her life time and to be taken by his son Palanisamy absolutely after the demise of his first wife. The properties described in the "A" schedule property to the abovesaid partition deed had been allotted to Kaliappa Gounder, the second wife Rajammal and their son Rajendran. It is further seen and also not in dispute that another partition was effected on 12.11.1993 between Kaliappa Gounder, the second wife Rajammal and his son Rajendran as per which the properties described in the "A" schedule to the abovesaid partition had been allotted to Kaliappa Gounder and his second wife Rajammal and the properties described in the "B" schedule to the abovesaid partition deed had been allotted to his son Rajendran. The partition deed dated 12.11.1993 has been marked as Ex.A2. The properties described in the "A" schedule as per Ex.A1 partition deed are the plaint schedule properties. It is thus found that the plaint schedule properties as per Ex.A2 partition deed had been allotted to Rajendran and his second wife Rajammal, the first defendant.

11.Now, according to the plaintiff, as the daughter of Kaliappa Gounder, she is entitled to claim $\frac{1}{4}$ share in the plaint schedule properties. It is put forth by the plaintiff that Kaliappa Gounder had not cared for her and also contended that her marriage was not celebrated by Kaliappa Gounder and that it was celebrated only by her mother and her mother's relatives and therefore, according to the plaintiff in the properties left behind by Kaliappa Gounder, as his daughter, she is entitled to $\frac{1}{4}$ share in the plaint schedule properties.

12.As could be seen from the materials placed on record, it is found that Kaliappa Gounder had not died intestate. It is found that he had bequeathed his properties in favour of the second wife and the daughters born through his second wife viz., the defendants 1 to 4 by way of a Will dated 30.09.1994 and the said Will has been marked as Ex.B4. The plaintiff has not put forth the case that Ex.B4 Will had not been executed by Kaliappa Gounder. On the other hand, according to the plaintiff's case, the defendants had persuaded Kaliappa Gounder and made him to execute the abovesaid Will and therefore, according to the plaintiff, the abovesaid Will had been brought about by the defendants 2 to 4 by exercising coercion, undue influence and misrepresentation and hence, the abovesaid Will is not valid and unenforceable. Further, according to the plaintiff, Kaliappa Gounder was not hale and healthy prior to his demise and he was suffering from diabetes and other complications.

13.Per contra, according to the defendants, Ex.B4 Will, a registered instrument, was executed by Kaliappa Gounder out of his own will and in a sound state of mind and accordingly, put forth the case that as per the said Will, the plaint schedule properties belonged only to the defendants and the plaintiff is not entitled to claim any share in the plaint schedule properties. Disputing the case of the plaintiff that the abovesaid Will had been brought about by them by exercising coercion, undue influence and misrepresentation on Kaliappa Gounder and hence, according to the defendants, Ex.B4 Will is true, valid and binding upon the plaintiff and therefore, she is not entitled to claim any share in the plaint schedule properties.

14.That the plaint schedule properties had been allotted to Kaliappa Gounder and the second wife Rajammal has not been disputed by the plaintiff and the same could be gathered from the recitals contained in Ex.A2 partition deed. It is further seen that Ex.B4 Will, a registered instrument, had been jointly executed by Kaliappa Gounder and his second wife viz., the first defendant. It is to be borne in mind that it is not the case of the plaintiff that Kaliappa Gounder had not executed Ex.B4 Will and the copy of the registered Will has been marked as Ex.B4. On the other hand, her case is that the said Will had been brought about by the defendants 2 to 4 by exercising coercion, undue influence and misrepresentation on Kaliappa Gounder and therefore, the said Will is invalid. In the light of the abovesaid pleas put forth by the respective parties, when the plaintiff has not disputed the execution of Ex.B4 by Kaliappa Gounder and her case is that the abovesaid Will had been brought about by the defendants by exercising coercion, undue influence and misrepresentation and when the abovesaid case of the plaintiff has been vehemently repudiated by the defendants, it is for the plaintiff to establish that Ex.B4 had been brought about by the defendants 2 to 4 as alleged by her. However, with reference to the abovesaid pleas put forth by the plaintiff, absolutely, there is no acceptable and reliable evidence on the part of the plaintiff. Other than the plaintiff examining herself as PW1 and marking the partition deeds dated 26.05.1975 and 12.11.1993 as Exs.A1 & A2, there is no other acceptable evidence on the side of the plaintiff to hold that Ex.B4 registered Will had been brought about or obtained by the defendants by exercising coercion, undue influence and misrepresentation on Kaliappa Gounder. It is found that Kaliappa Gounder had married the first defendant as his second wife during the subsistence of the first marriage. Accordingly, it is further found that Kaliappa Gounder had been living only with his second wife and the children born through his second wife. When Kaliappa Gounder had already made provisions and allotted shares in the family properties in favour of his first wife and the son born through his first wife by way of Ex.A1 partition deed, resultantly, it is found that thereafter, Kaliappa Gounder had been separately living with his second wife and the children born through her.

15.The case has been projected by the plaintiff that Kaliappa Gounder was not maintaining good health prior to his demise. According to the plaintiff, he was suffering from Diabetes and other complications. As to what are the other complications, there is no clear case put forth by the plaintiff and also there is no material on the part of the plaintiff to evidence that Kaliappa Gounder was not maintaining good health prior to his demise. Be that as it may, it is admitted that Kaliappa Gounder died only in the year 2002. It is thus found that nearly 8 years after the execution of Ex.B4 Will, Kaliappa Gounder had died. Therefore, when it is found that Kaliappa Gounder, during his life time and when he was maintaining good health, had chosen to bequeath the plaint schedule properties in favour of the defendants along with the first defendant and when the execution of Ex.B4 Will by Kaliappa Gounder had not been challenged by the plaintiff as such, but only put forth the case that the defendants had exercised coercion, undue influence and misrepresentation on him for the execution of the same in their favour and when with reference to the said case of the plaintiff, there is absolutely no proof and material pointing to the same and when it is found that Kaliappa Gounder had died nearly 8 years after the execution of Ex.B4 Will, in all considering the facts and circumstances, as rightly contended by the defendants' counsel and determined by the trial Court, it is found that the case has been falsely projected by the plaintiff that Ex.B4 Will had been obtained by the defendants by exercising coercion, undue influence and misrepresentation.

16.As above pointed out, Ex.B4 Will had not been executed by Kaliappa Gounder alone and on the other hand, it is found that Ex.B4 Will had been executed by both Kaliappa Gounder and his second wife Rajammal, the first defendant, after reserving life interest in the plaint schedule properties by way of Ex.B4 Will on himself and the first defendant. It is found that the plaint schedule properties had been given absolutely in favour of the defendants 2 to 4. When the execution of Ex.B4 Will by Kaliappa Gounder has not been put to challenge by the plaintiff and she had only put forth the case that the same had been brought about by the defendants 1 to 4 as alleged by her and when as above pointed out, the said case of the plaintiff has not been buttressed by any proof whatsoever on the part of the plaintiff, in such view of the matter, the resultant position would be that Ex.B4 Will had been executed by Kaliappa Gounder out of his wish and in a sound state of mind and on his own volition. The testatrix viz, the first defendant has tendered evidence as DW1. DW1 has clearly deposed about the execution of Ex.B4 Will by Kaliappa Gounder along with her bequeathing the suit properties in favour of the defendants 2 to 4 after reserving life interest for themselves and she has clearly deposed about the health condition of Kaliappa Gounder at the relevant point of time

and the preparation of Ex.B4 Will on their directions by the scribe and the execution of the said Will by Kaliappa Gounder and herself in the presence of the attestors as well as the registration of the same. In all, it is found that by way of the evidence of DW1, the defendants have established the truth and validity of Ex.B4 Will. Not stopping there, the defendants had lent support to their case in proving the truth and validity of Ex.B4 by examining the scribe as DW2 and DW2 Kannan has also tendered evidence that he is associated with the family of Kaliappa Gounder over a period of time and that he had scribed the partition deed Ex.A2 and that he knew Kaliappa Gounder and his family and that, he had prepared Ex.B4 Will as per the direction of Kaliappa Gounder and the first defendant and accordingly, the Will prepared by him after having been accorded by Kaliappa Gounder, had been executed by Kaliappa Gounder in the presence of the attestors and in his presence along with the first defendant and the same had been duly registered. Despite cross examination, nothing has been culled out from the evidence of DWs1 & 2 to discredit their evidence with reference to the execution of Ex.B4 Will by Kaliappa Gounder and the registration of the same as per law. Therefore, it is found that as rightly held and determined by the trial Court, the truth and validity of Ex.B4 Will, has been amply substantiated by the defendants through the evidence of DWs1 & 2.

17.The plaintiff's counsel however would contend that the proof of Will should be established. The proof of the truth and validity of the Will in question should be established by examining one of the attestors to the same as per law and when the defendants have failed to examine the attestors to the said Will, according to him, the Will in question should be held to have been not established as per law. In this connection, he placed reliance upon the decisions reported in 2004-1-L.W.546 (Ayyasamy Pillai Vs. Rajangam and another) and 2008-2-L.W.750 (Sarojini and another Vs. Mohandoss and two others). No doubt, when the Will in question is at issue, particularly, the execution of the same by the testator concerned, the truth and validity of the same should be established by examining one of the attestors to the said Will. However, in so far as the present case is concerned, as above pointed out, as far as the execution of Ex.B4 Will is concerned, it is not the case of the plaintiff that the said Will , a registered instrument had not been executed by Kaliappa Gounder. On the other hand, the plaintiff herself has admitted the execution of the registered Will Ex.B4 by Kaliappa Gounder and it is put forth that the same had been brought about by the defendants by exercising coercion, undue influence and misrepresentation. However, when the above plea of the plaintiff has not been established in any manner and other than making the said plea, the plaintiff has not sustained her case by placing acceptable and reliable proof, in such view of the matter, as rightly put forth by the defendants counsel, the inevitable conclusion that could be

arrived is that Ex.B4 Will had been voluntarily executed by Kaliappa Gounder in a fit state of mind and already, as above noted, Kaliappa Gounder died nearly 8 years after the execution of Ex.B4 Will. Therefore, the case of the plaintiff that Kaliappa Gounder was not maintaining good health prior to his demise would not discredit the truth and validity of Ex.B4 Will.

18.No doubt, Ex.B4 the original Will has not been produced by the defendants and only the certified copy of the same has been marked as Ex.B4. However, from the materials placed on record, it is found that the original Will having been lost, the certified copy of the same had been obtained by Kaliappa Gounder himself during his life time and the same could be gathered from the recitals found in Ex.B4 Will itself. Therefore, when it is found that Kaliappa Gounder himself had taken the initiative to obtain the certified copy of the same, for the reason that the original Will having been lost, in such view of the matter, particularly when as above noted, the execution of Ex.B4 Will, Kaliappa Gounder having not been controverted by the plaintiff as such and her challenge to the abovesaid Will, as above pointed out, not having been established, in all, it is found that the non production of the original Will by the defendants would not in any manner be fatal to the case and on that score, we cannot discredit the defence version and reject Ex.B4 Will.

19.In the light of the above discussions, I hold that the Will dated 30.09.1994 executed by Kaliappa Gounder is true, valid and binding on the plaintiff. I therefore, hold that the plaintiff is not entitled to obtain partition and separate possession of $\frac{1}{4}$ share in the plaint schedule properties as claimed in the plaint and accordingly, the Point Nos. 1 & 2 are answered.

20.Point Nos.iii & iv

For the reasons aforesaid, the Judgement and Decree dated 23.07.2009 passed in O.S.No.171 of 2008 on the file of the Additional District Judge, Fast Track Court No.2, Salem, are confirmed and resultantly, the first appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CO MDU)

//True copy//

Sub Assistant Registrar

sms

To

1.The Additional District Judge,
Fast Track Court No.2, Salem

Copy to

2.The Section Officer, V.R.Section, High Court, Madras.

+1cc to Mr.P.Jagadeesan, Advocate SR.No.88531

+1cc to Mr.S.Sivakumar, Advocate SR.No.89347

A.S.No.272 of 2011

RR(CO)
GMY(18/08/2020)