

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.09.2019
PRONOUNCED ON : 04.10.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

A.S.No.36 of 2011

1. V.Vijayakumar
2. V.Vasanth
3. Vedanayagi (Deceased) ... Appellants/Defendants 1 & 2

(Appellants 1 and 2 and the 1st respondent LRs of the deceased 3rd appellant Vedanayagi as per the memo dated 20.08.2019 and vide court order dated 20.08.2019 made in A.S.No.36 of 2011)

Vs.

1. M.Radha ...1st Respondent/Plaintiff
2. Tmt.Bhanumathi
3. The Union of India,
rep by the General Manager,
Southern Railway,
Chennai.
4. The Divisional Manager,
Southern Railway,
Palghat Division,
Palghat, Kerala.
5. The Divisional Manager,
Southern Railway,
Salem Division, Salem. ..Respondents 2 to 5/Defendants 4 to 7

Prayer: Appeal Suit filed under Order 41 Rule 1 r/w section 96 of Civil Procedure Code as against the judgment and decree dated 29.07.2010 made in OS No.89 of 2008 on the file of the Additional District Court/Fast Track Court No.I, Erode.

For Appellant : Mr.N.Manokaran

For R1 : Mr.K.S.Jeyaganeshan

For R2 to R5: No representation/no appearance
set ex-parte vide order dated 23.09.2019

JUDGMENT

Aggrieved over the judgment and decree dated 29.07.2010, passed in O.S.No.89 of 2008, on the file of the Additional District Court/Fast Track Court No.I, Erode, the defendants 1 to 3 have 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, past and future mesne profits, permanent injunction and mandatory injunction.

4. Briefly stated, according to the case of the plaintiff, she is the daughter of the third defendant and the deceased G.N. Venugopal and the defendants 1 and 2 are her brothers and the fourth defendant is the sister of the deceased G.N. Venugopal and the plaint A schedule properties are the ancestral properties of the deceased G.N. Venugopal which had been allotted to him as per the partition deed dated 09.05.1990. The plaintiff's marriage took place on 30.08.1995 and by virtue of the amended Act 1 of 1990, the plaintiff became a coparcener and as such, she is entitled to 1/4th share in the plaint A schedule properties and her father G.N. Venugopal died intestate and also in harness while he was working as a station master at Kodumudi Railway station and accordingly, the plaintiff is also entitled to obtain 1/4th share in the death benefits of her father. On the demise of G.N. Venugopal his 1/4th share devolves upon the plaintiff and the defendants 1 to 3 and on his mother Marammal and Marammal having died on 25.12.2007, the plaintiff would be entitled to 1/120 share as the legal heir of Marammal and in toto, the plaintiff would be entitled to obtain 37/120 share in the plaint A schedule properties and 1/4th share in the plaint B schedule property and also put forth that the defendants 1 to 3 are collecting Rs.6,000/- per month as rent by way of leasing out the plaint A schedule properties and the plaintiff is also entitled to seek a job from the defendants 5 to 7 on compassionate ground and hence, the plaintiff demanded partition by way of the legal notice and to the same the defendants sent a reply notice with false allegations and hence, according to the plaintiff, the need for the suit for appropriate reliefs.

5. The defendants 1 to 3 resisted the plaintiff's suit contending that the plaint A schedule properties are not the

ancestral properties of G.N. Venugopal and according to them, after the demise of Natraya Naidu, his properties devolved upon his son G.N. Venugopal, his wife and daughter and all the abovesaid legal heirs divided the properties by way of a partition deed dated 09.05.1990 and denied the case of the plaintiff that she had also become a coparcener by virtue of the amended Act 1 of 1990 and entitled to 1/4th share in the plaint A schedule properties and the plaintiff has not been made as a member of the partition deed dated 09.05.1990 and therefore, without setting-aside the abovesaid partition deed, the plaintiff is not entitled to claim any share in the plaint A schedule properties. The defendants also disputed the claim of the plaintiff that G.N. Venugopal died intestate and on the other hand, according to them, G.N. Venugopal left behind a Will executed by him on 21.10.2007 bequeathing his share in the suit properties in favour of his wife, the third defendant and after his demise, the third defendant became the absolute owner of the properties bequeathed under the Will and the same had been set out in the reply notice by the defendants and also disputed the case of the defendants that she is entitled to the death benefits of the deceased G.N. Venugopal. Further denied that they had leased out the plaint A schedule properties and getting Rs.6,000/- as rental income and accordingly, prayed for the dismissal of the plaintiff's suit.

6. The defendants 5 to 7 put forth the case that the deceased G.N.Venugopal, while working in the Southern Railway station as station master Grade-I at Kodumudi Railway station, died on 30.10.2007 and the amounts due to be settled on his demise to the eligible family members are detailed in the written statement and according to them, the family pension is admissible only to the eligible surviving members and further, according to them, the deceased G.N.Venugopal did not nominate any person for receiving the death benefits and it is put forth that the death benefits are disbursed to his wife as per the Railway Rules and hence, contended that the plaintiff is not entitled to claim any share in the death benefits as well as not entitled to claim any job on compassionate grounds as a matter of right. The grant of appointment on compassionate ground depends not only on the relationship of the claimant to the deceased employee but also on various other factors and accordingly contended that the plaintiff's suit is liable to be dismissed.

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

1. Whether the plaintiff is entitled to 37/120 shares in the 'A' schedule properties?
2. Whether the plaintiff is entitled to

get any share in the 'B' scheduled property?

3. Whether the plaintiff can get past and future mesne profits in 'A' schedule properties?

4. Whether the plaintiff can get relief of mandatory injunction and permanent injunction against the defendants 5 to 7?

5. To what relief?

Additional issue:

Whether the alleged Will dated 21.10.2007 is true, valid and binding upon the plaintiff?

8. In support of the plaintiff's case, PW1 was examined, Exs.A1 to A25 were marked. On the side of the defendants, DWS 1 to 3 were examined, Ex.B1 was marked. Exs.X1 and X2 were also marked.

9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to declare that the plaintiff is entitled to obtain partition and separate possession of 37/120 share in the plaint A schedule properties and also further declared that the plaintiff is entitled to 1/4th share in the death benefits of G.N. Venugopal excepting the family pension and directed the determination of the past and future mesne profits by relegating the same by way of a separate proceeding and accordingly, granted the preliminary decree in favour of the plaintiff. Impugning the same, the defendants 1 to 3 have preferred the First Appeal.

10. The following points arises for determination in the First Appeal:

1. Whether the plaintiff is entitled to obtain the partition and separate possession of 37/120 share in the plaint A schedule properties as claimed in the plaint?

2. Whether the plaintiff is entitled to obtain partition of 1/4th share in the plaint B schedule property?

3. Whether the plaintiff is entitled to claim past and future mesne profits in respect of the plaint A schedule properties as put forth in the plaint?

4. To what relief the plaintiff is entitled to?

5. To what relief the defendants 1 to 3/appellants are entitled to?

Point Nos.1 to 3:

11. The relationship between the plaintiff and the defendants 1 to 4 is not in dispute. It is found that the third defendant is the wife of the deceased G.N.Venugopal. The plaintiff is the daughter and the defendants 1 and 2 are the sons of the deceased G.N.Venugopal and the third defendant Marammal is the mother of the deceased G.N. Venugopal and Natraya Naidu is his father and the fourth defendant is the daughter of Natraya Naidu and Marammal i.e., the sister of the deceased G.N.Venugopal. It is found that as determined by the trial Court and also not in dispute between the parties that the plaint A schedule properties had been allotted to the deceased G.N. Venugopal by way of the partition deed dated 09.05.1990, which document has been marked as Ex.A4. On a perusal of Ex.A4 partition deed, it is found that the same had come to be effected between the deceased G.N. Venugopal, his mother and the sister, namely, the fourth defendant and the properties described in the 'B' schedule in the abovesaid partition deed had been allotted to the deceased G.N. Venugopal. The abovesaid properties had been described as the plaint A schedule properties. The plaint B schedule property is described as the death benefits of the deceased G.N. Venugopal and according to the plaintiff, G.N. Venugopal died in harness while working as a station master leaving behind the plaintiff and the defendants 1 to 3 as his legal heirs and accordingly, put forth her claim that she is entitled to 1/4th share in the death benefits.

12. From the materials placed on record, it is found that the plaintiff had got married after the commencement of the amended Act 1 of 1990 and the plaintiff's father G.N.Venugopal had died on 30.10.2007. Accordingly, it is found that the plaintiff would also become a coparcener in respect of the family properties obtained by G.N. Venugopal by way of Ex.A4 partition deed and accordingly, the plaintiff would claim that she is entitled to obtain 1/4th share in the plaint A schedule properties. Considering the materials placed on record, noting that the properties which were the subject matter of Ex.A4 partition deed had been derived from the ancestors of the deceased G.N. Venugopal, in such view of the matter, as rightly put forth by the plaintiff, the legal heirs of G.N. Venugopal would also be entitled to obtain their lawful shares in the same and the plaintiff having become the coparcener by virtue of the amended Act 1 of 1990, accordingly, it is found that as correctly determined by the trial Court, she is also entitled to 1/4th share in the plaint A schedule properties and the share being allotted to the grand mother Marammal on the demise of G.N. Venugopal and when it is seen that Marammal had also died

and accordingly, it is found that the plaintiff would also be entitled to her lawful share in the share given to Marammal and in toto, it is seen that the plaintiff would be entitled to obtain the partition of 37/120 share in the plaint A schedule properties.

13. The argument has been put forth by the defendants 1 to 3 that inasmuch as the plaintiff has not been shown as a party in the partition deed Ex.A4, according to them, without setting-aside the partition deed within the stipulated period, the plaintiff is not entitled to claim any share in the A schedule properties. However, as rightly held by the trial Court, the abovesaid argument does not merit acceptance. As rightly found by the trial Court, when it is found that the defendants 1 and 2 are also not shown as the parties in the abovesaid partition deed and when the plaintiff has become a co-parcener by virtue of the amended Act 1 of 1990, in all, it is found that as similar to the defendants 1 and 2, the plaintiff would also be entitled to obtain her lawful share in the plaint A schedule properties as the coparcener and the same cannot be denied to the plaintiff on the footing that she is not a party to the abovesaid partition deed.

14. The main defence that has been projected by the defendants 1 to 3 for denying the claim of the plaintiff's share in the plaint A schedule properties is that, according to them, the deceased G.N.Venugopal did not die intestate and on the other hand, he had left behind the Will executed by him on 21.10.2007 and it is put forth that by way of the abovesaid Will, he had bequeathed his properties in favour of his wife, namely, the third defendant and hence, according to the defendants 1 to 3, the plaintiff is not entitled to lay any claim of share in the plaint A schedule properties.

15. The Will dated 21.10.2007 has been marked as Ex.B1. In the reply notice itself, the defendants have projected the abovesaid Will said to have been executed by G.N. Venugopal. In the rejoinder sent by the plaintiff, she had demanded the production of the copy of the said Will to her. However, the abovesaid demand made by the plaintiff had not been complied with by the defendants. Furthermore, the defendants have not produced the said Will along with the written statement. Only during the course of trial, the abovesaid Will had been projected by the defendants. As to why the defendants had taken their own time in the production of the Will very belatedly, that too, only during the course of trial, there is no plausible explanation offered on the part of the defendants. Be that as it may, when Ex.B1 Will has been totally challenged by the plaintiff as an invalid document and not executed by her father

as put forth by the defendants, the defendants being the propounders of the said Will, particularly, the third defendant, should establish the veracity and validity of the said Will as per law.

16. To sustain the truth and validity of Ex.B1 Will, the defendants had examined the attestors of the said Will as DWs 2 and 3. However, as rightly held by the trial Court and also considering the evidence of DWs 2 and 3 in toto, both adduced during the course of chief examination and cross examination, it is found that they have not witnessed the execution of the will by G.N.Venugopal. Their evidence would only go to show that by the time when they went to the residence of the deceased G.N. Venugopal, the Will in question had already been typed and signed by G.N. Venugopal. Therefore, it is evident that both DWs 2 and 3 had not actually witnessed the execution of the Will by G.N. Venugopal in their presence and in such view of the matter, it is found that the evidence of DWs 2 and 3 has not satisfied the requirements of the attestation of the Will as provided under Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act. In such view of the matter, no safe credence could be attached to their evidence for upholding the truth and validity of Ex.B1 Will. Both DWs 2 and 3 would claim that they had been solicited by G.N.Venugopal to come and attest the Will, however, as above noted, they have not actually witnessed the execution of the Will in question by G.N. Venugopal and the same had already been typed and signed by G.N. Venugopal even before their arrival. DW2 would state that he does not know who had typed the Will. According to DW2, only two witnesses had attested the Will. DW3 would claim that three witness had attested the Will. Furthermore, DW3 having admitted that the Will had not been executed in his presence by G.N.Venugopal, would claim that only on the trust and faith, he has deposed that the Will in question contains his signature. Therefore, when the evidence of DWs 2 and 3, at the foremost, failed to satisfy the essential ingredients of the execution of the Will by testator concerned and also not satisfied the requirements of the attestations as contemplated under law, particularly, their evidence not satisfying the requirements qua the witness of their attestation by the testator concerned as well as the witness of the execution of the Will by the attestors concerned as above pointed out and resultantly, the position being when the Will in question had not been executed by G.N. Venugopal in the presence of the attestors and in such view of the matter, Ex.B1 Will projected by the defendants cannot be accepted as a true one and accordingly, the trial Court is found to be justified in holding that the defendants had failed to satisfy the legal requirements for upholding the truth and validity of the Will in accordance with law. On that determination, the trial Court had also opined that the third

defendant had also not taken steps to send the Will for expert's scrutiny. No doubt, the expert's scrutiny would not be required for upholding the truth and validity of the Will as such. Be that as it may, when considering the evidence of DWs 2 and 3, when they had failed to establish the execution and the attestation of the Will in question as per law, as above pointed out, in all, it is found that the Will projected and relied upon by the defendants cannot be accepted in any manner and the trial Court is found to be justified in not placing reliance upon the said Will.

17. The defendants have failed to establish the truth and validity of Ex.B1 Will. Resultantly, the position would be that G.N.Venugopal had died intestate leaving behind the plaintiff and the defendants 1 to 3 as his legal heirs. Furthermore, the share allotted to Marammal, the mother of G.N. Venugopal would also be inherited by the plaintiff and the defendants 1 to 3 in accordance with law and accordingly, in toto, it is found that as put forth by the plaintiff, she would be entitled to obtain 37/120 share in the plaint A schedule properties and therefore, the trial Court is found to be justified in holding that the plaintiff is entitled to obtain the partition and separate possession of 37/120 share in the plaint A schedule properties.

18. As regards the plaint B schedule property, the same being the death benefits of G.N. Venugopal, according to the plaintiff, she is entitled to obtain 1/4th share in the same. It is not in dispute that G.N.Venugopal died in harness while serving in the Southern Railway. It is also found that he has not nominated any person to receive the death benefits. Even assuming that even if any person is nominated, the nominee would be entitled to receive the same but the amount so received should be distributed to the legal heirs according to the law of succession. Therefore, when according to the defendants 5 to 7, the death benefits had been disbursed to the third defendant, wife of G.N.Venugopal, at the most, the third defendant on the obtainment of the same, is liable to disburse the benefits amongst all the legal heirs of the deceased G.N. Venugopal as per law and accordingly, as held by the trial Court, excepting the family pension to which the third defendant may have exclusive claim, in respect of the other death benefits comprised in the B schedule property, the plaintiff is found to be entitled to 1/4th share in the same and therefore, the abovesaid determination of the trial Court in favour of the plaintiff qua the B schedule property does not warrant any interference.

19. From the materials placed on record, the trial Court is found to be justified in determining the issue of the past and future profits and relegating the same by way of a separate

proceeding as per law and the same do not warrant any interference. The trial Court had also rightly determined on the consideration of the materials available on record that the plaintiff is not entitled to obtain the reliefs of permanent and mandatory injunction as against the defendants and the plaintiff has also not preferred any appeal or cross objection in the present appeal challenging the same.

20. The counsel for the defendants contended that the opinion of the expert for proving the signature of the testator in the Will is not a relevant factor for determining its truth and validity and in this connection, placed reliance upon the decision of this Court reported in 2018-5-LW370 (Periathal and Ors. Vs. Gomathi and Ors.). No doubt the abovesaid proposition of law had been determined in the abovesaid decision. However, considering the facts and circumstances of the case at hand, when as above pointed out, the defendants, as the propounders of the Will in question, having failed to establish the truth and validity of the same and the evidence of the attestors adduced on their behalf did not satisfy the legal requirements and did not bring home the truth and validity of the Will in question in accordance with law, in all, it is found that the contentions of the defendants' counsel that the trial Court had erred in rejecting the Will in question without any basis, as such, cannot be countenanced.

21. In the light of the abovesaid discussions, the plaintiff is found to be entitled to obtain the partition and separate possession of 37/120 share in the plaint A schedule properties and also found to be entitled to 1/4th share in the death benefits of the deceased G.N. Venugopal described in the plaint B schedule property excepting the family pension and the determination of the trial Court relegating the enquiry of the mesne profits by way of the separate proceeding being proper, accordingly, the Point Nos. 1 to 3 are answered in favour of the plaintiff and against the defendants.

22. In the light of the abovesaid discussions, the judgment and decree dated 29.07.2010, passed in O.S.No.89 of 2008, on the file of the Additional District Court/Fast Track Court No.I, Erode are confirmed. Resultantly, the First Appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To:

1. The Additional District Court,
Fast Track Court No.I, Erode.
- 2.The General Manager,
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3. The Divisional Manager,
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Palghat, Kerala.
4. The Divisional Manager,
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A.S.No.36 of 2011

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