

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.07.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.797 of 2008 & S.A.No.137 of 2009
and MP.No.1 of 2008, MP.No.1 of 2013 in SA.No.797 of 2008
and MP.No.1 of 2014 in SA.No.137 of 2014

S.A.No.797 of 2008 :

Subramaniam Appellant/Appellant/Plaintiff

Vs

- 1.Rangasamy Gounder (Died) ...1st Respondent/1st Respondent/1st Defendant
- 2.Natesan (Died)2nd respondent/3rd respondent/6th Defendant
- 3.Kaliannan (Died) (Memo dated 11.03.2019 in SA.No.137/2009)
- 4.Selvi
- 5.Suganthi
- 6.Kavitha ...Respondents 3 to 6/Respondents 4 to 7/
Lrs of the Deceased 2nd Defendants
- 7.Krishnaveni
- 8.Palanivel
- 9.Marayee
- 10.Dhanalakshmi ... Respondents

(Respondents 7 and 8 are brought on record as legal representatives of the deceased second respondent Vide Order of Court dated 15.3.2019 in MP.No.1 of 2015 in S.A.No.797/2008)

(Respondents 9 and 10 are brought on record as legal representatives of the deceased first respondent viz., Rangasamy Gounder Vide Order of Court dated 28.06.2019 Vide CMP.No.11128/2019 in SA.No.797/2008)

S.A.No.137 of 2009 :

- 1.Rangasamy Gounder (Died) Appellant/Appellant/1st defendant
 - 2.Marayee
 - 3.Dhanalakshmi Appellants 2 & 3
- (Appellants 2 and 3 are brought on record as L.Rs of the deceased sole appellant viz., Rangasamy Gounder Vide Order of Court dated 28.06.2019 in CMP.No.13198/2019 in S.A.No.137 of 2009)

Vs

1.Subramaniam1st respondent /1st respondent / Plaintiff

2.Natesan (Died)
3.Kaliyannan (Died)
4.Selvi
5.Suganthi
6.Kavitha
7.Krishnaveni
8.Palanivel

(Respondents 7 and 8 are brought on record as legal representatives of the deceased second respondent Vide Order of Court dated 15.3.2019 in MP.No.1 of 2015 in S.A.No.137/2009)

(Vide memo dated 11.03.2019, the 3rd respondent Kaliannan is stated to be dead leaving behind his 3 daughters viz., Selvi, Suganthi, Kavitha as Lrs who are already on record as respondents 4 to 6. The said memo is recorded.)

Prayer in S.A.No.797 of 2008 :- Second Appeal filed under Section 100 of the Civil Procedure Code, preferred against the judgment and decree of the Subordinate Judge's Court at Namakkal, dated 28.02.2007 in A.S.No.77 of 2002 in partly reversing the judgment and decree of the District Munsif Court at Tiruchengode, dated 31.08.1999 in O.S.No.1652 of 1981.

Prayer in S.A.No.137 of 2009 :- Second Appeal filed under Section 100 of the Civil Procedure Code, preferred against the judgment and decree dated 28.02.2007 made in A.S.No.79 of 2002 on the file of Sub Court, Namakkal, confirming the judgment and decree dated 31.08.1999 made in O.S.No.1652 of 1981 on the file of the District Munsif Court, Tiruchengode.

In S.A.No.797 of 2008 :
For Appellant : Mr.P.Valliappan

For Respondents : Mr.N.Manokaran [R9 & R10]
Mr.D.Shivakumaran [R7 & R8]
R4 to R6 - No Appearance
R1, R2 & R3 - Died

In S.A.No.137 of 2009 :
For Appellants : Mr.N.Manokaran
for P.Valliappan for R1

For Respondents : Mr.D.Shivakumaran [R7 & R8]
R4 to R6 - No Appearance
R1, R2 & R3 - Died

COMMON JUDGMENT

A suit for partition was laid in O.S.1652/1981 by the plaintiff against his father, the first defendant, and his grandparents and their branches. The suit was dismissed by the trial Court with costs, consequent to which, both the son, the plaintiff, and his father, the first defendant in the suit have preferred two separate appeals before the first appellate Court respectively in A.S.No.77 of 2002 and A.S.No.79 of 2002 challenging the decree of the trial Court. The first appellate Court partially allowed the appeal in A.S.No.77 of 2002 filed by the son, and dismissed the appeal in A.S.No.79 of 2002 filed by the father. Challenging the concurrent judgments of Courts below, the father and son, the duo, have come forward with a set of second appeals. Parties would be referred to by their rank before the trial Court.

2. The brief facts are :

- The suit property measures an extent of 10.24 acres. It is an agricultural property. The admitted statement on either side is that the suit property originally belonged to Sellappa Gounder and Gowri Shankar.
- Sellappa Gounder had four sons. They are defendants 2 to 4, and one Kandappa Gounder. Kandappa Gounder had died long back and his son is the sixth defendant. Both the defendants 3 and 4 died bachelors. The second defendant had a son and a daughter. His son is the first defendant and his daughter is the fifth defendant. The plaintiff is the son of the first defendant.
- Be that as it may, under Ext.B3, partition deed, Sellappa Gounder, his four sons and Gowri Shankar partitioned the property. In this partition, the suit property was allotted to Sellappa Gounder and his branch. A month later, on 09.08.1962 to be precise, under Ext.B1, partition deed, Sellappa Gounder and his four sons divided the properties. Notwithstanding this partition, as there was some confusion in the mode of allotment made in the partition deed, the third and fourth defendants herein instituted a suit for partition in O.S.No.90 of 1967 against the present defendants 1 and 2. On 10.12.1969, a preliminary decree came to be passed. Ext.A1 is the judgment and Ext.A2 is the decree in O.S.No.90/1967.
- Aggrieved by the preliminary decree in O.S.No.90/1967 passed against them, the present defendants 1 and 2, who are also the defendants 1 and 2 in the earlier suit in O.S.No.90/1967, had preferred A.S.No.406/1971 before the Sub Court, Salem, and that came to be dismissed. Challenging the said decree of the first appellate Court they preferred a second appeal with an application to condone the delay in filing it in SA.SR10703/1974 before this Court, but not even the delay was condoned by this Court, and the appeal never

came to be taken on file.

- In the meantime, final decree came to be passed in I.A.No.60/72 in O.S.90/1967 on 23.10.1973, and is evidenced by Ext.A3. It is in this setting the plaintiff has laid the suit for partition.
- The grounds for institution of the present suit by the plaintiff is that:
 - On his birth, he became a coparcenar and that he is entitled to the share in the property.
 - Secondly, neither his grandfather (the second defendant) nor his father defended (the first defendant) had defended the earlier suit in O.S.No.90/1967 adequately, and thereby they exposed the right of the plaintiff to peril.

3. During the pendency of the suit, the fourth defendant died on 28.01.1985 and the third defendant died on 12.06.1992. As already indicated, both of them died bachelors. The sixth defendant, the nephew of the third and fourth defendants (he being the son of their pre-deceased brother Kandappa Gounder) stepped into succeed to their estate on the strength of Ext.B6, Will dated 03.12.1983 to defend the estate of D3 and D4 in the suit, and was promptly impleaded in the present suit. It appears that only the first defendant had filed additional written statement impugning the Will.

4. The vital line of the controversy now shifted to ascertain the genuineness of Ext.B6 Will. The Courts below found that the Will is a registered Will, that both D.W.3 and D.W.4, the attestors thereof have spoken about the due execution of the Will and that the same appealed to the courts below as trustworthy and reliable. This apart, the Courts also relied on the averment of the third defendant in an affidavit he had filed in support of I.A.No.567/1985 before the trial Court, in which he had disclosed the Will. The trial Court pondered as to why the Court needed to investigate the genuineness of the Will when one of the testators had disclosed about the Will that he and his brother had executed even during his lifetime. Based on the proof to the genuineness of Ext.B6 Will, the first appellate Court adopted the same line of reasoning of the trial Court.

5. The learned counsel for the respondents 7 and 8, who are the pendente lite purchasers under the sixth defendant had brought to the notice of the Court that it was only when the defendants 3 and 4 herein attempted to take possession of the property allotted to them in Ext.A3 final decree, this suit came to be filed.

7. On hearing both counsel, this Court frames the following substantial question of law:

"Whether the decree of the first appellate court requires to be interfered with."

8. On going through the papers, this Court does not find any material which may warrant this Court to admit these cases. The genuineness of the Will is a question of fact, and both the Courts have concurrently held it to be genuine. In the matter of appreciating the evidence, they have also inter alia relied on the affidavit of one of the joint testators of Ext.B6 Will. Could there be a greater proof than the testator himself disclosing about the Will? And, nowhere this court finds that the courts below had erred in appreciating the evidence.

9. In conclusion, this Court does not find merit in these appeals. Therefore, the appeal preferred as concerning the shares of the third and fourth defendants have to be dismissed. Having stated thus, since the first defendant has not challenged, his son, the plaintiff's right to seek a share in his share property allotted to him in O.S.No.90/1967, the preliminary decree indeed may have to be granted. The materials on record does not disclose that the first defendant had any children other than the plaintiff. Therefore, the first defendant had already been allotted 1/3 share in the suit property and this 1/3 share has to be divided equally between the first defendant and his son, the plaintiff. To this extent, there ought to be a preliminary decree declaring the right of the plaintiff to the 1/3rd share, to which the first defendant is entitled to as per the decree passed in O.S.No.90/1967. Therefore, both the Courts below ought to have passed a preliminary decree only to this extent. This Court chooses to modify the decree, based on facts already available.

10. Therefore, S.A.No.797 of 2008 is partly allowed as concerning the plaintiff's share in the share of the first defendant, which the latter has obtained in O.S.No.90/1967 and as to the rest it is dismissed. So far as S.A.No.137 of 2009 is concerned, the focus is on Ext.B6 Will and as already held nothing survives in this appeal for consideration. Hence, S.A.No.137 of 2009 is dismissed. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To:

1.The Subordinate Judge
Namakkal.

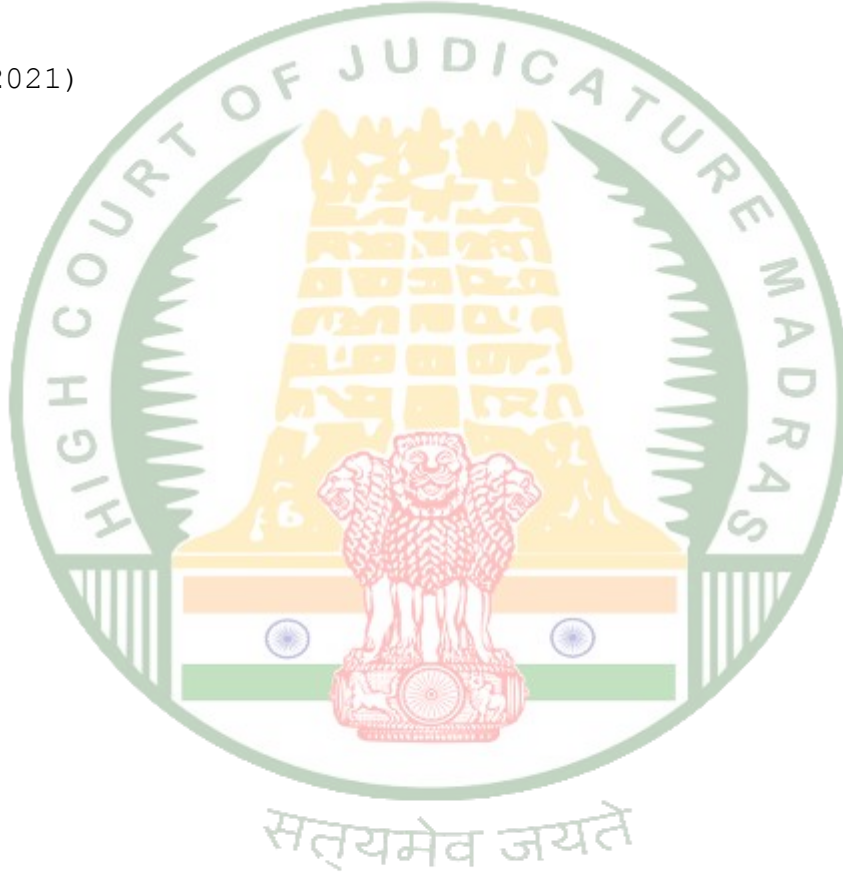
2.The District Munsif
Tiruchengode.

3.The Section Officer
VR Section, High Court, Madras.

+2cc to Mr.D.Shivakumaran, Advocate SR.55884, 56152
+2cc to Mr.N.Manokaran, Advocate SR.55911, 55910
+1cc to Mr.P.Valliappan, Advocate SR.55815

S.A.No.797 of 2008 &
S.A.No.137 of 2009

PVS (CO)
CB(19/03/2021)



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