

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.07.2019

CORAM:

THE HON'BLE MR.JUSTICE N.SESHASAYEE

S.A.NO.1279 OF 2005

1.Ambikapathy
2.S.Bhoopathy

...Appellants/Appellants/
Plaintiffs

Vs.

1. Manickam Ammal (died)
2. Deivanayaga Padayachi (died)
3. Kolanjiappan
4. Gnanakannu
5. Janakiammal
6. Shanmugam
7. Valliammal
8. Rajeswari
9. Arulmozhi
10. Vijaya
11. Saravanan
12. Saratha
13. Vasanthi

...Respondents/Respondents/Defendants

[Appellants 1 and 2 and R4 and R5 are the LRS of the deceased R1 viz Manickam Ammal, as per the memo dt 26/03/19 and Vide order dt 20/06/19 made in SA 1279/05]

[RR7 to 13 brought on record as LRS of the deceased R2 viz., Deivanayaga Padayachi Vide Order of Court dated 15/07/2019 made in CMP.No.8343, 8344 and 8348/2019 in SA.No.1279/2005]

Prayer:-

Second Appeals filed under Section 100 of Civil Procedure Code against the Judgement and Decree in A.S.36/2002 dt.3/9/2004 passed on the file of Sub Court, Panruti confirming the judgment and the decree dt. 16.9.2002 passed in O.S.151/91 before District Munsif's Court, Panruti.

For Appellants : Mrs.R.Meenal

For Respondents : Mr.R.Sunil Kumar for R5 and R6
N/A for R4 and RR7 TO 13

JUDGMENT

The plaintiffs in a suit for partition, having suffered successive decrees dismissing the suit and appeal preferred by them, have come forward with this appeal. Parties would be referred to by their rank before the trial Court.

2. The plaint schedule has three items of properties, of which two items are immovable properties. These properties stand in the name of the first defendant. He was married to the second defendant and they have two sons and two daughters, of who, the plaintiffs herein are the sons and the defendants 5 and 6 are the daughters. Alleging that the suit properties were purchased with the funds of the plaintiffs in the name of their father, the first defendant, the plaintiffs laid the suit for partition. The first defendant during his lifetime had executed some sale deeds concerning a portion of the properties in favour of the defendants 3 and 4.

3.The primary contention of the defendants 1 and 2 in their written statement was that the suit properties are the absolute properties of the first defendant. The fifth defendant had filed the written statement supporting the plaintiffs. The sixth defendant in her written statement would plea that the second defendant, her mother, had executed a settlement deed dated 25.09.1991 as regards her properties. This document is marked as Ext.B-1. As regards the suit properties, the first defendant had executed a Will dated 04.4.1994 marked as Ext.B2 in favour of the sixth defendant again. This Will was proved by D.W.6, the attester of the document.

4.Both the Courts below have entered a concurrent finding that the suit properties are not the ancestral properties of the plaintiffs, but the personal and absolute properties of the first defendant. They also found that Ext.B2 Will had been adequately proved. Aggrieved by this decree, the plaintiffs have come forward with this appeal.

5.The appeal is admitted on the following substantial questions of law :

- 1) Whether in law the Courts below are right in holding that the properties were the separate properties of the father of the appellants, when the joint execution of the sale

deeds by all the three clearly showed that they were joint family properties?

- 2) Whether in law the Courts below are right in finding that Ex.B-2 Will was true and valid when it had not been proved as required under the Evidence Act and the Indian Succession Act?

6.The learned counsel for the appellants argued that the Courts below have committed an error in holding that the suit property is not an ancestral property. Even if this aspect is kept aside, it is the case of the sixth defendant that the first defendant/father had executed Ext.B-2, Will dated 04.04.1994 bequeathing the first schedule of property, which is an agricultural property measuring to an extent of 1.29.0 hectares, and the only house property described as B schedule item 3, in favour of the sixth defendant. No properties have been bequeathed even to the fifth defendant, the other sister of the plaintiffs'. Therefore, it is not just the plaintiffs who were excluded from the Will, but, even the fifth defendant has been excluded. The Will therefore, is not a natural Will, and the fact some of the natural heirs were excluded in the Will should not have been overlooked by the Courts below. She however, made a fair statement that the father/first defendant himself during his lifetime had sold B schedule items 2 and 1 Vide Exts.B.6 and B.8 respectively in favour of defendants 3 and 4.

7.Per contra, the learned counsel for the contesting respondents 5 and 6 (who is the penultimate purchaser of the A-schedule property from the sixth defendant), argued that the fifth defendant was excluded because she had been giving constant support to the plaintiffs to the discomfort of their father. Besides, the Will is a registered will. The testator was about 80 years old when he executed the Will, and it recites that neither of his sons had cared him (the father) or his wife (the mother) but on the other hand they tortured them. Secondly, the plaintiffs have not produced any material before the Court to show that the suit properties indeed are ancestral properties. This gives an absolute power to the first defendant to deal with his property, the way he likes. Turning to the alleged un-naturality of the Will, not only the grounds for excluding the other heirs were spelt out in the Will, but, the Will was also proved in the manner that law requires. The sixth defendant had examined D.W5, D.W.6 and D.W.7, all of who are the scribe and the attestors of the Will and who speak to the due execution of the Will.

8. As to the character of the property, this Court hardly finds any material to hold that they are ancestral properties.

Necessarily, this Court ought to concur with the statement made on behalf of the sixth defendant that the first defendant had absolute power of disposition over his properties. Turning to the Will, a mere exclusion of a natural heir itself is not a ground to vitiate a Will for, it is a mere criterion or a factor, and in a given case this may tilt the balance against the genuineness of the Will. Whether the balance in this case is tilted is a matter of fact and here this Court finds the testimony of D.W.5, D.W.6 and D.W.7 are cogent and satisfactory. After all, the Courts are not required to view every Will with suspicion, and if any suspicious circumstances are generated by attending circumstances, then Courts are only required to look for availability of believable explanations. In this case, the explanation is available even in the Will.

9.The learned counsel for the appellants submitted that so far as item 3 in B schedule is concerned, the appellants/plaintiffs continue to be in possession, and that they are in settled possession. This point is besides the cause of action involved in this case and therefore, it is to be considered separately.

10.In conclusion, this Court does not find any merit in this appeal and accordingly, the appeal is dismissed and the Judgement and Decree passed in A.S.36/2002 dt.3/9/2004, on the file of Sub Court, Panruti confirming the judgment and the decree dated 16.9.2002 passed in O.S.151/91, before the District Munsif Court, Panruti is upheld. No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

tsg

To:

1. The Sub Judge, Panruti.
2. The District Munsif Court, Panruti.

Copy To

The Section Officer
VR Section, High Court, Madras.

+1cc to Mr.R.Sunil Kumar, Advocate, S.R.No.63783

+1cc to Mrs.R.Meenal, Advocate, S.R.No.63586

S.A.No.1279 of 2005

SSI(CO)

CS/13/02/2020