

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.01.2019

CORAM:

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH
AND

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

O.S.A. Nos. 59 & 158 of 2012
in MP.NO.1 OF 2015

OSA No. 59 of 2012

1. Kuppammal
2. Sasirekha ...Appellants

Vs.

1. Palaniswamy
2. Shanmugham
D. Subramanian (Deceased)
3. Lakshmana Nadar
4. Kumarasamy Nadar
5. Thangavel
6. Chandaravadanaammal
7. Venkatesan
8. Murugesan
9. Saravanan
10. L. Chellammal
11. L. Vijaya Kumar
12. L. Shantha Kumar
13. L. Paneerselvam
14. K. Mallika
15. L. Jeyakumar
16. L. Arumugam
17. P. Vaijayanthimala
18. P. Shanthi
19. K. Meenakshi ...Respondents

OSA No. 158 of 2012

K. Shanmugam ...Appellant

Vs.

1.D. Palaniswamy
2. Subramani ...Respondents

Prayer in O.S.A.No.59 of 2012 : Appeal under Order 36 Rule 2 of the O.S. Rule read with Clause 15 of the Letters Patent against the order dated 14.10.2011 made in Tr. C.S. No. 508 of 2001.

Prayer in O.S.A.No.158 of 2012: Appeal under Order 36 Rule 2 of the O.S. Rule read with Clause 15 of the Letters Patent against the order dated 14.10.2011 made in T.O.S. No. 38 of 1995 (O.P. No. 157 of 1995).

For Appellants : Mr.K.P. Gopala Krishnan
in OSA.59/2012

For Respondents: Mr.K.V. Ananthakrishnan for R1,
in OSA.59/2012 R7 to R9, R19.
Mr. G. Suryanarayanan for R9
Mr. M.D. Ashraf Ali
for R10, R12, R14, R15, R17, R18
Mr. M.D. Ashraf Ali
for Mr. N. Ishfiaa Ahmed for R2, R4
No Appearance for other Respondents

For Appellant : Mr.G.Suryanarayanan
in OSA.158/2012

For Respondents : Mr.K.V. Ananthakrishnan for R1
in OSA.158/2012 R2 - Died

COMMON JUDGMENT
(Delivered by M.M.SUNDRESH, J.)

As these two appeals arise out of common order, they are disposed of accordingly.

2. OSA No.59 of 2012 has been filed by the plaintiffs in the suit, which has been filed for partition and separate possession. OSA No. 158 of 2012 has been filed by the appellant who is the plaintiff in the testamentary original suit, which was originally filed to probate Ex. P2 (Will) and seeking granting of letters of administration. The learned Single Judge framed the following issues:-

"In T.O.S. 38 of 1995

(1) Whether the will alleged to have been executed by Nagarathinammal dated 16.07.1990 is true, genuine and valid?

(2) Whether the plaintiff is entitled for

grant of Letter of Administration as prayed for?

(3) To what relief, the plaintiff is entitled to?

In Tr.C.S. No. 508 of 2001

(1) Whether the plaintiffs are entitled to partition and separate possession of 1/3rd share in the plaint schedule properties?

(2) Whether the alleged Will dated 5.4.1989 and 16.7.1990 said to have been executed by the late Nagarathinammal are valid and are binding on the parties?

(3) Whether the Will dated 16.7.1990 and 5.4.1999 are forged and fabricated by the defendants?

(4) Whether the suit is bad for non-joinder for necessary parties?

(5) Whether all the suit properties originally belonged to Kuppusamy Nadar?

(6) Whether late Nagarathinammal was the owner of Item No.3 of the plaint schedule property?

(7) To what relief the plaintiffs are entitled to?"

3. Before the learned Single Judge, number of documents have been relied upon. The appellant in OSA No. 158 of 2012 made reliance upon Exs.P1 to P28.

4. The suit property originally belonged to one Kuppusamy Nadar and Nagarathinammal, who were husband and wife. Kuppusamy Nadar predeceased Nagarathinammal. Nagarathinammal executed two Wills in Exs. P1 and P2. Ex.P1 is a registered Will and Ex.P2 was deposited on the file of Sub-Registrar Office and registered after her death. Under both these Wills, Nagarathinammal bequeathed properties in favour of the plaintiffs, D2, D3, D6 and one D.S. Mani.

5. The learned Single Judge dismissed the suit for partition filed by the second class heirs of the deceased Nagarathinammal and Kuppusamy Nadar on the premise that some of the co-owners have not been arrayed as party defendants. The testamentary original suit was dismissed holding that Ex.P2 has not been proved in the manner known to law. Challenging the aforesaid judgment and decree rendered by the learned Single Judge dismissing both the suits, these appeals are filed.

6. Learned counsel appearing for the appellant in OSA No.59 of 2012 submits that the learned Single Judge was not

right in dismissing the appeal for non-joinder of necessary parties. The suit for partition cannot be dismissed for non-joinder of necessary parties. If the court is of the view that the other co-owners are not added as party defendants, appropriate direction ought to have been issued instead of dismissing the suit. In the event of this court dismissing both the appeals, the suit filed in Tr.C.S No. 508 of 2001 (O.S. No.1 of 1994 on the file of the Subordinate Judge, Vellore) will have be directed to be tried along with subsequent suit filed in OS No.126 of 2016 on the file of Sub-Court, Vellore.

7. Learned counsel appearing for the appellant in OSA No.158 of 2012 submits that the testamentary court is not a court of suspicion. Ex.P5 clearly shows that the appellant is the son of the deceased Kuppusamy Nadar. Ex. P5 is a public document. Even Ex.P1 was in favour of the appellant. Merely because there were certain discrepancies, the learned Single Judge was not right in holding that execution of Ex.P2 was not proved. The grandson of the testator was examined since he was no more. Therefore, the appeal will have to be allowed.

8. Therefore, only two questions arise for consideration before us. They are:

- (i) whether the dismissal of the suit in Tr.C.S No. 508 of 2001 on the ground of non-joinder of necessary parties is proper? and
- (ii) Is the learned Single Judge right in dismissing the suit holding that Ex.P2 has not been proved in the manner known to law?

9. Coming to the first issue, we are of the view that the submissions of the learned counsel appearing for the appellant appears to be correct. The suit for partition cannot be dismissed on the sole ground of non-joinder of necessary parties. If the court is of the view that there are other parties which are to be heard, other than the persons arrayed as defendants, a direction should have been issued to the plaintiffs to implead them. In law, any number of preliminary decrees can be passed. Therefore, no finality can be attached to it. In such view of the matter, we are not inclined to accept the reasoning of the learned Single Judge.

10. However, inasmuch as subsequently a separate suit has been filed coupled with the fact that even the present suit, which was originally pending in OS No. 1 of 1994 on the file of Sub-Court, Vellore, was transferred to this

Court, we direct the Registry to send the papers in Tr.C.S No. 508 of 2001 to the file of Subordinate Court, Vellore, to be tried along with O.S.No.126 of 2016. Both the suits will have to be decided together and disposed of within a period of six months from the date of receipt of a copy of the order.

11. Coming to OSA No.158 of 2012, the learned Single Judge rightly held that suspicious circumstances have not been dispelled by the appellant. The appellant even in the proof affidavit stated that Ex.P2 was handwritten. The said statement was sought to be resiled in the cross-examination stating that it has been typed. Consequently, as rightly held by the learned Single Judge, there is no material to hold that both the attestators are not alive. The evidence of the grandson of the attestator has to be seen in that background, though he has stated to have identified the signature. In such view of the matter, we do not find any error warranting interference in the decision arrived at by the learned Single Judge.

12. One more issue which has to be seen is the status of the appellant. The learned Single Judge has merely left open the said issue to be decided. Inasmuch as we directed the Sub-Court, Vellore to decide both the suits and the appellant is also a party defendant in the suit in OS No. 1 of 1994 as D2, an issue can be framed in this regard and answered by the Sub-Court, Vellore. It is open to the appellant to mark all the documents to make all his contentions. Taking note of the fact that the appellant has marked the documents on the file of testamentary original suit, the Registry is directed to send all the records filed by the parties in the aforesaid suit before the Sub-Court, Vellore.

13. Accordingly, OSA.No. 158 of 2012 stands dismissed. We make it clear that we have not expressed anything on the merits of the case. Therefore, the learned Sub-Judge, Vellore is directed to decide all the issues and contentions raised on its own merits and in accordance with law without being influenced by the observations made either by the learned Single Judge or by us.

In the result, O.S.A.No.59 of 2012 is partly allowed and O.S.A.158 of 2012 is dismissed with the observations as indicated above. No costs. Consequently connected M.P.No.1 of 2015 is closed.

Sd/-

Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

ssm

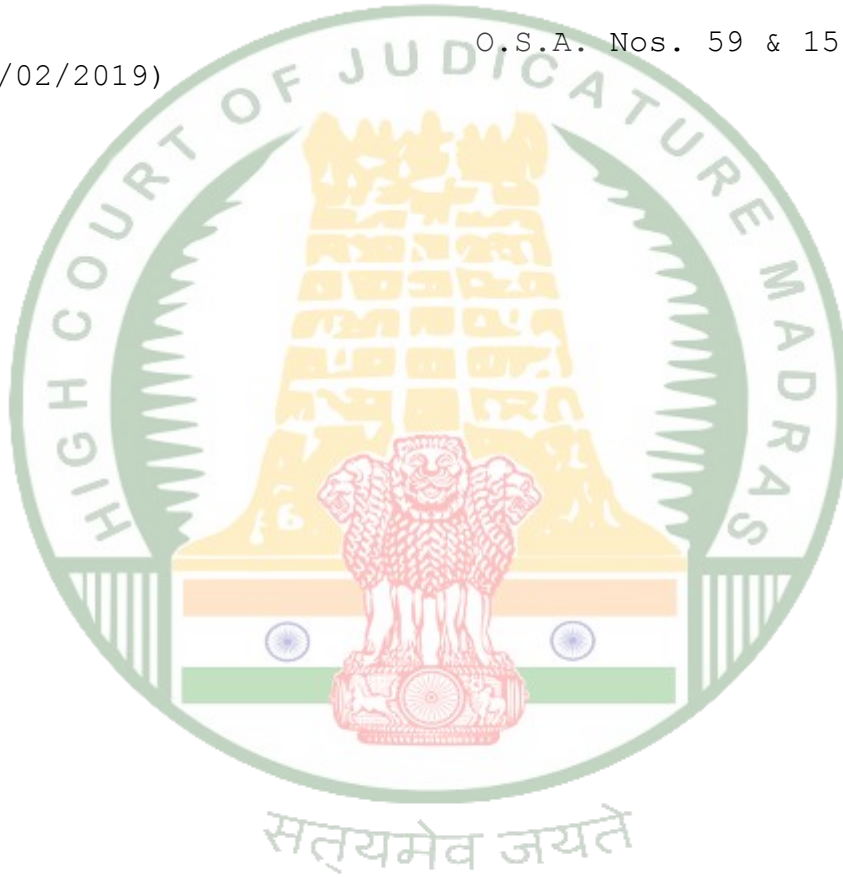
To

The Sub Assistant Registrar
Original Side
High Court, Madras.

+1cc to Mr.K.P. Gopala Krishnan , Advocate SR.No. 5191
+2cc to Mr.K.V. Ananthakrishnan , Advocate SR.No. 5892,5893,
+1cc to Mr.N. Ishfiaa Ahmed , Advocate SR.No. 4968

A.SK(22/02/2019)

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