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IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.936 of 2012 &
M.P.No.1 of 2012

1. G.Nataraj
2. V.Thangaraj Appellants/Defendants

Vs

1. Sellammal
2. Valliammal Respondents/Plaintiffs

Prayer :- Second Appeal has been filed under Section 100 of C.P.C. against the judgment and decree dated 06.07.2011 in A.S.No.74 of 2009 on the file of the I Additional District Court, Coimbatore confirming the judgment and decree dated 19.09.2007 passed in O.S.No.229 of 2006 on the file of the I Additional Subordinate Court, Coimbatore,

For Appellants: Mr.V.Lakshminarayan
for Mr.M.Easan

For Respondents: Mr.R.Muralidharan
for Mr.S.Gunalan

JUDGMENT

Aggrieved over the concurrent finding of the Courts below in decreeing the suit filed for partition, the second appeal has been filed.

2. The parties are arrayed as per their own ranking before the trial Court.

3. The plaintiffs and the first defendant are daughters and son of one Ganapathy Gounder. The second defendant is the son of one Velusamy. He is the another son of the said Ganapathy Gounder. The suit property has been purchased by the said Ganapathy Gounder in the year 1941. After his purchase, he has

treated the property as a joint family property and the property has been jointly enjoyed by the plaintiffs and the defendants. There was no partition in the suit property. Therefore, the plaintiffs had sent a legal notice. However, the defendants have not come forward for amicable settlement. Hence, the suit.

4. The first defendant has filed the written statement and the second defendant has adopted the written statement of the first defendant. Denying the allegation that the property was enjoyed by the plaintiffs, it is the contention of the defendants that the suit property is a self acquired property of one Ganapathy Gounder. Till the date of the death of the mother of the plaintiffs and the first defendant, the Ganapathy Gounder and the first defendant and the father of the second defendant have been in possession and enjoyment of the properties. After the demise of the mother, they have partitioned one portion of the property by registered partition dated 25.10.1987. From the date of partition, they are in possession of the property. Subsequent to that on 09.02.1989, the remaining properties have been partitioned between late Ganapathy Gounder and his two sons. In respect of the said property, the said Ganapathy Gounder has executed a registered Will on 31.01.2000 in favour of the first defendant. Again on 17.01.2006, the first defendant and the father of the second defendant have entered into another partition. Hence, prayed for dismissal of the suit.

5. The trial Court framed the following issues :

1. Whether the plaintiffs are entitled for partition and other reliefs as prayed for?
2. Whether the Will dated 31.01.2000 is true and valid?
3. To what relief?

6. In the trial Court, on the side of the plaintiffs P.W.1 was examined and Ex.A.1 and Ex.A.2 were marked. On the side of the defendants, D.W.1 to D.W.3 were examined and Ex.B.1 to Ex.B.8 were marked.

7. The learned trial Court analysing the entire facts had decreed the suit for partition. The trial Court had held that the suit property is a joint family property and also disbelieved the Will projected by the defendants. The first appellate Court also confirmed the finding of the trial Court. As against which, the present second appeal has been filed.

8. The main contention of the learned counsel for the appellants is that the suit property is a self acquired property of one Ganapathy Gounder and he along with his two sons by a registered partition had partitioned one portion of the property and the remaining properties have also been partitioned in the year 1987 and 1989 and the same was reduced into writing subsequently. The properties allotted to the said Ganapathy Gounder has been bequeathed in favour of the first defendant by a registered Will. According to the learned counsel, since the dispossession has taken place prior to 20.12.2004, the plaintiffs cannot claim any share in the suit property. However, the partition has been effected among the male members. The oral partition alien to the Hindu law, the above partition has been acted upon. Hence, the Courts below rejecting the contention of the defendants is not correct. The execution of the Will has been proved. It is a registered Will. No suspicious circumstance, whatsoever has been brought on record in the cross examination of the attesting witnesses. Hence, submitted that the Courts below have not appreciated the facts and granted partition. In support of his submissions, he has relied upon the judgments in A.E.G.Carapiet Vs. A.Y.Derderian reported in 1961 AIR (Calcutta) 359, Javr Chand and others Vs. Pukhraj Surana reported in 1961 AIR (SC) 1655, Roshan Singh and others Vs. Zile Singh and others reported in 1988 AIR (SC) 881, Rajinder Pershad (dead) by LRs. Vs. Smt.Darshana Devi reported in 2001 (1) SCC 69, Shyamal Kumar Roy Vs. Sushil Kumar Agarwal reported in 2006(11) Supreme Court Cases 331, Badrinarayan Shankar Bhandari and others Vs. Omprakash Shankar Bhandari and others reported in 2014 AIR (Bombay) 151, Prakash and others Vs. Phulavati and others reported in 2016 AIR (SC) 769, R.Seethamma @ Seetha Vs. M.Thimma Reddy reported in 2017 (2) MWN (Civil) 465.

9. Whereas, it is the contention of the learned counsel for the respondent that the trial Court and the first appellate Court has clearly found that the properties were ancestral properties and treated as joint family properties. The alleged registered partition as pleaded has not been proved and no documents have been filed in this regard and cannot be given any effect in view of proviso to Section 6(1) of the Hindu Succession Act. It is his further contention that the Will has not been proved in the manner known to law. The attestation and execution has not been established. Therefore, submitted that the Courts below clearly found that the Will has not been proved. Hence, submitted that the Second Appeal is liable to be dismissed. In support of his contentions he relied upon the judgments in Lalitaben Jayantilal Popat Vs. Pragnaben Jamnadas Kataria and others reported in CDJ 2008 Supre Court Cases 2120,

Prakash and others Vs. Phylavati and others reported in 2016-2-L.W.865, Danamma @ Suman Surpur Vs. Amar reported in 2018 (1) RCR (Civil) 863.

10. The following substantial question of law have been formulated in this Second Appeal :

i) Whether the Lower Appellate Court in the background of its finding that the suit properties are coparcenary properties, is correct in law in applying the provisions of Section 6 of the Hindu Succession Act, 1956 as amended by Central Act 39 of 2005 to the facts of the case, when succession to property had opened on the death of father on 16.12.2002 long before the amendment?

ii) Has not the Lower Appellate Court committed an error in law in holding that the plaintiffs who are daughters would be entitled to an equal share with the sons in co-parcenary property by giving retrospective operation to the provision of Section 6 of the Hindu Succession Act as amended by Central Act 39 of 2005 and applying the same to a case where the succession to property had opened prior to the Amendment Act?

iii) Whether the plaintiffs are not entitled to the benefit of Tamil Nadu act 1 of 1990, which occupied the field in the interregnum from 25.03.1989 till 20.12.2004, the date with effect from the Central enactment was given effect to?"

11. The suit has been filed by the sisters of the first defendant and the aunt of the second defendant. The first defendant is the brother of the plaintiffs and the second defendant is the son of the brother of the plaintiffs and the first defendant. The suit properties have been originally purchased by the said Ganapathy Gounder, which fact has not been disputed by both sides. Ex.A.1 has been filed to show that the said Ganapathy Gounder originally purchased the property on 20.07.1941. It is the contention of the plaintiffs that after purchase of the property, it was treated as a joint family property. Whereas, the defendants have taken a plea that it was self acquired property. Evidence have been adduced by both sides to prove their respective contentions.

12. Though the defendants have pleaded that the property is a self acquired property, D.W.1 in his evidence has admitted that the property has been purchased out of the income from the ancestral nucleus. Ex.B.1 filed by the defendant is said to be

the memorandum of family arrangement regarding past event of partition in respect of the suit property said to have been taken place on 25.10.1987, the same clearly indicate that the property has been described as a joint family property. Ex.B.2 makes it clear that the property is a joint family property. Similarly, Ex.B.3, registered partition deed entered between the defendants 1 and 2 also clearly indicate that the property is an ancestral property. The recitals in Ex.B.1 and Ex.B.3 makes it clear that the suit properties are ancestral properties. Therefore, the finding of the trial Court and the first appellate Court that the properties are ancestral properties cannot be found fault with.

13. The contention of the defendant that there were registered partition in respect of the ancestral properties on 25.10.1987 has not been established. It is their further contention that in an oral partition on 25.10.1987, the property was divided among Ganapathy Gounder and his two sons and the property allotted to Ganapathy Gounder in 'A' schedule property. The above oral partition which was recorded as family arrangement under Ex.B.1. The property allotted to Ganapathy Gounder was subsequently bequeathed to the first defendant by way of a registered Will by Ganapathy Gounder.

14. In line to the above stand in the pleadings, now it has to be analysed whether the testamentary dispossession as pleaded by the defendant, debars the plaintiff from claiming any share. It is relevant to extract Section 6 of the Hindu Succession Act which reads as follows :

6. Devolution of interest in coparcenary property. —

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005*, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

15. The proviso to the above Act is very clear that the Amended Act 39 of 2005 will not affect or invalidate any disposition or alienation including any partition or testamentary disposition of the property which had taken place before the 20th day of December 2004. Whereas, it is the contention of the defendants that there was a registered partition deed. The same has not been proved before the trial Court. The only document projected to prove the above contention is Ex.B.1 memorandum of partition. Section 6(5) of the Hindu Succession Act makes it clear that nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004. The partition also defined as any deed of partition duly registered under the Registration Act or partition effected by the decree of a Court. While introducing the above amendment, the bill was referred to the Standing Committee and the Committee in its deliberation in Clause 35 to 37 has recommended that in case where oral partition is recognised, it should be backed by proper evidentiary support.

16. In this regard, the Full Bench of the Bombay High Court had an occasion to consider the oral partition genuinely effected in a family. In the judgment in Badrinarayan Shankar Bhandari and others Vs. Om Prakash Shankar Bandari and others reported in 2014 AIR (Bombay) 151, the Bombay High Court has dealt with regard to the oral partition and the relevant paragraphs reads as follows :

"43. It is significant to note that amended Bill was introduced in Rajya Sabha on 20 December 2004 and therefore Parliament saved all dispositions or alienations including partition and testamentary disposition of property, which had taken place before introduction of the Bill in Rajya Sabha, but even registered partition deeds and the partitions obtained by decree of Court after 20 December 2004 are not saved. Otherwise some people might have executed such registered 4 AIR-2010-Karnataka-124 46 of 72 SA.566.2011 partition deeds or obtained collusive decrees of the Court between 20 December 2004 and 8 September 2005 to deprive daughters of their rights in the coparcenary property by removing the property in question from the stock of coparcenary property, thus changing the nature of the property by such device.

Similarly, sub-section (5) of Section 6 makes it clear that nothing in amended section shall apply to a partition which was effected before 20 December

2004.

44. Learned counsel for the appellants would, however, submit that explanation to Section 6 clearly provides that partition means any partition made by execution of a deed duly registered under the Registration Act, 1908 or a partition effected by a decree of a Court and therefore, if an oral partition had taken place before 20 December 2004, such partition would not be saved either by the proviso to sub-section (1) or sub-section (5) of Section 6.

It is, therefore, submitted that oral partition effected of coparcenary property even if effected in the year 1957, would not be saved and therefore Section 6 must be held to be retrospective with effect from 17 June 1956.

45. Though the argument may prima facie appear to be attractive, it does not recognize the distinction between an oral partition or partition by unregistered document which is not followed by partition by metes and bounds on the one hand and oral partition or 47 of 72 SA.566.2011 partition by unregistered document which was acted upon by physical partition of the properties by metes and bounds and entries made in the public record about such physical partition by entering the names of sharers as individual owner/s in the concerned public record, (such as records of the Municipal Corporation or the Property Registers maintained by the Government) on the other hand. It is only where an oral partition or partition by unregistered document is not followed by partition by metes and bounds, evidenced by entries in the public records that a daughter would be in a position to contend that the property still remains coparcenary property on the date of coming into force of the Amendment Act. Thus for the Amended Section 6 to apply, not only the daughter should be alive on the date of commencement of the Amendment Act, but also the property should be coparcenary property on the date of the commencement of the Act i.e. 9 September 2005 or at least on 20 December 2004, when the Amendment Bill was introduced in Rajya Sabha."

The Full Bench of the Bombay High Court has held that when a genuine oral partition followed by partition by metes and bounds evidenced by entries in public records, also saved will not be affected under the Amended Act 39 of 2005. Such a oral partition has to be proved by metes and bounds and evidenced by entries in public records. The above view of the Bombay High

Court in Badrinarayan Shankar Bhandari and others Vs. Om Prakash Shankar Bandari and others reported in 2014 AIR (Bombay) 151 was approved by the Honourable Supreme Court in Prakash and others Vs. Phulavati and others reported in 2016 -2-L.W.865 and the Honourable Supreme Court has upheld the view Division Bench of the Bombay High Court in paragraphs 40 to 57.

17. In view of the above, this Court is of the view that an oral partition which was followed by metes and bounds and evidenced by necessary entries in the Revenue records, also can be relied upon to show that the properties have been partitioned. Ex.B.1 is filed to show that it is only a memorandum recording past event of partition allegedly took place on 25.10.1987. Though the memorandum regarding the past event of partition which has already taken place, does not require any compulsory registration, now it is to be noted that whether Ex.B.1 proves oral partition by metes and bounds. Except Ex.B.1, there is no other document to show that the division has been taken place and mutation has been carried out and there was partition by metes and bounds. Therefore, Ex.B.1 relied upon by the defendants cannot be given much importance to rely upon for oral partition.

18. Yet another aspect to disbelieve the oral partition is Ex.B.6. If really, there is already a partition affected in the year 1987, there was no necessity for registering another partition deed in the year 2006. The recitals in Ex.B.6 clearly indicate that the properties are not divided by metes and bounds. Therefore, Ex.B.1 cannot be pressed into service to show the oral partition between the parties.

19. Now it has to be analysed whether the Will propounded by the testator has been proved in the manner known to law. The initial onus always lies on the propounder to prove the execution and attestation of the document as contemplated under Section 63(c) of the Indian Succession Act. When a doubt is inherent in the Will, the onus is also on the propounder to remove the suspicious circumstances. In the absence of proving attestation and execution, the Will cannot be relied upon. The attestation and execution contemplated under section 63(1) are distinct acts. Each act has to be proved in the manner known to law. In the absence of proving any one of the act namely attestation as well as the execution, the Will cannot be considered as proved.

20. In the light of the above settled position, now it has to be analysed whether the evidence of the attesting witness satisfy the proof as mandated under law. The attesting witness has been examined as D.W.3. He has stated in his evidence that

he has seen Ganapathy Gounder putting his thumb impression on the Will and the said Ganapathy Gounder has seen D.W.3 signing the document. But his evidence does not show whether he has also seen another witness signing the Will and the testator seen both the attesting witnesses signing the Will in her presence.

21. In Lalitaben Jayantilal Popat Vs Pragnaben Jamnadas Kataria and others reported in CDJ 2008 Supreme Court Cases 2120 it has been held as follows :

"9. It is thus clear that one of the requirements of due execution of will is its attestation by two or more witnesses which is mandatory.

10. Section 68 of the Evidence Act speaks of as to now a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by Clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act does not say that both or all the attesting witnesses must be examined.

But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way,

Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. to put in other words, if one attesting witness can prove execution of the will in terms of Clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does

not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove

the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness

19 there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act." (Emphasis supplied)

Following the said decision, as also the other decisions in Benga

Behera (Supra), this Court held:

"21. It was also not necessary for the appellants to confront him with his signature in the Xeroxed copy of the Will, inasmuch as the same had not appeared in the certified copy. Execution of a Will must conform to the requirement of Section 63 of the Succession Act, in terms whereof a Will must be

attested by two or more witnesses. Execution of a Will, therefore, can only be proved in terms of clause (c) of Section 63 when at least one of the two witnesses proves the attestation. A Will is required to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will. Section 68 of the Evidence Act provides for the requirements for proof of execution of the Will. In terms of said provision, at least one attesting witness has to be examined to prove execution of a Will."

In line with the above judgment, the evidence of attesting witnesses, when carefully seen, the same does not prove attestation as mandated under law. Further, the Will in question, as rightly noted by the first appellate Court, the attesting witness does not know who has prepared the Will and as the executant was having hand shivering at the relevant point of time, he has put his thumb impression in the Will. All these facts clearly show that there is suspicious circumstance attached to the Will. Hence, the contention of the appellant counsel cannot be countenanced.

22. Admittedly, the suit property is an ancestral property as per the evidence of the parties. The plaintiffs are married much prior to the Act 1 of 1990 of Tamilnadu. Therefore, they are not entitled to any share as per the Tamilnadu Act. Thereafter, the original co-parcener died in the year 2002 itself. When the co-parcener has already died, notional partition has to be assumed. The plaintiffs can claim equal share, only if the father is alive on the date of commencement of the Act 39 of 2005 and the Act is prospective in nature. This fact is not in dispute. In the judgment of the Apex Court in Prakash and others (Supra), the apex Court has held that Act 39 of 2005 is prospective in nature and only the daughters of the living co-parcener as on 9th September 2005 are entitled to equal share. Admittedly, the father of the plaintiffs died in the year 2002, much prior to the Act come into force. The notional partition has to be assumed on the date of his death. Since, the succession already opened, the right is already vested by operation of law due to unamended provision. Therefore, this Court is of the view that the plaintiffs are certainly not entitled to equal share as that of their brothers. The first appellate Court has not gone into this aspect and granted equal share, which is not correct. Hence, the plaintiffs are entitled to share from their father alone, who died in the year 2002, and not equal share as held by the Courts below. Accordingly, the plaintiffs each are entitled to 1/12 share and the defendants each are entitled to 5/12 share in the

suit property.

23. Accordingly, this Second Appeal is partly allowed and the judgment and decree of the Courts below are modified to the effect that the plaintiff each are entitled to 1/12 share in the suit property. Consequently, connected miscellaneous petition is closed. No cost.

s/d-
Assistant Registrar (CS VI)

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Sub-Assistant Registrar

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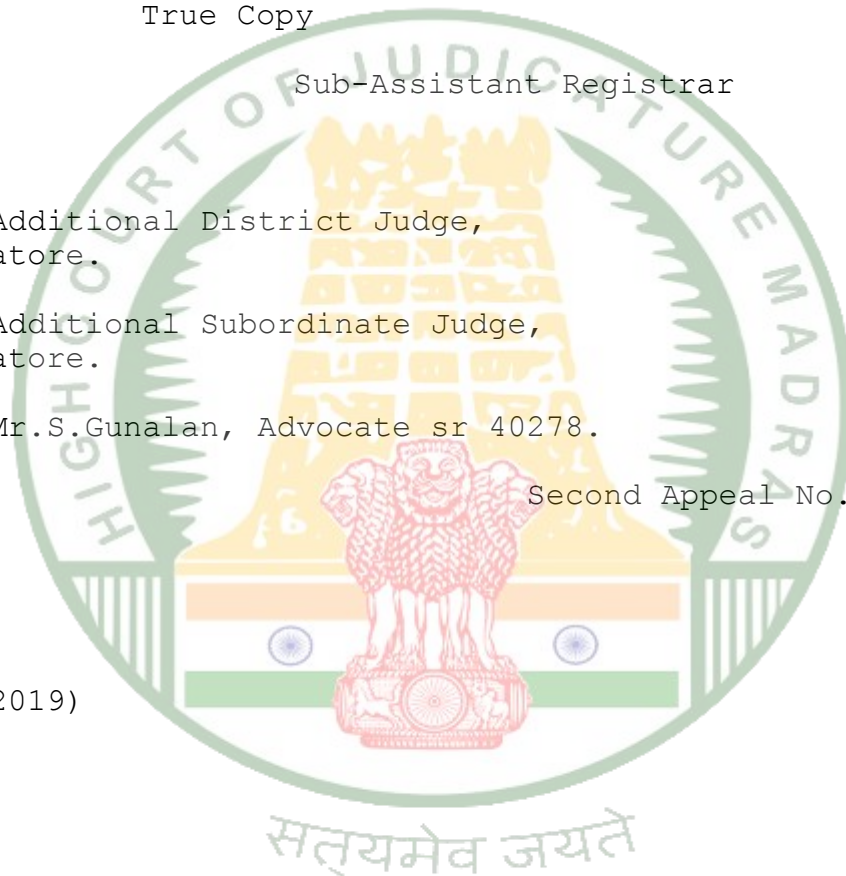
1. The I Additional District Judge,
Coimbatore.

2. The I Additional Subordinate Judge,
Coimbatore.

+1 CC to Mr.S.Gunalan, Advocate sr 40278.

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