

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.11.2019

PRONOUNCED ON : 12.12.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

A.S.No.699 of 2014

Murugesan ...Appellant/4th defendant

Vs.

1.Jegadhambal

2.Kesavamoorthy

3.Gopalakrishnan

...Respondents 1 to 3/
Plaintiffs

4.Pappathi

5.Saraswathi

6.Malarkodi @ Vijayalakshmi

... Respondents 4 to 6/
Defendants 1 to 3

Prayer:- First Appeal has been filed under Section 96 of CPC against the judgment and decree dated 28.02.2014 passed in O.S.No.196 of 2012 on the file of the Additional District Court, Namakkal (Full Additional in charge).

For Appellant : Mr.T.Dhanya Kumar

For Respondent : Mr.N.Manokaran
Nos.1 to 3

Respondent No.4 to 6: No appearance/set exparte
vide order dated 15.11.2019

JUDGMENT

Aggrieved over the judgment and decree dated 28.02.2014 passed in O.S.No.196 of 2012 on the file of the Additional District Court, Namakkal (Full Additional in charge), the 4th defendant has 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 and permanent injunction.

4.The case of the plaintiffs in brief is that the defendants 2 to 4 and Subramanian, the husband of the first plaintiff and the father of the plaintiffs 2 & 3 are the children of the first defendant and the suit properties described in the plaint schedule had been allotted to Muthusamy, the father of the defendants 2 to 4 and Subramanian by way of the partition deed dated 29.11.1969 and accordingly, Muthusamy and his children were enjoying the suit properties jointly without effecting any partition and Muthusamy and his children are each entitled to 1/5th share in the suit properties and Subramanian died on 09.02.2011 leaving behind the plaintiffs and his mother viz., first defendant as his legal heirs and it was only Subramanian, who was looking after the needs of Muthusamy and inasmuch as Subramanian had died leaving behind the plaintiffs as his legal heirs, Muthusamy, with a view to provide them separately, had chosen to bequeath 1/5th share in the suit properties in favour of the plaintiffs 2 & 3 by way of a Will and accordingly, executed the Will in favour of the plaintiffs 2 & 3 on 10.02.2011 and Muthusamy having died on 25.02.2011, based on the abovesaid Will executed by him and as the legal heirs of the deceased Subramanian, in all, the plaintiffs are entitled to 23/60 shares in the suit properties and accordingly, unable to continue the joint possession of the suit properties with the defendants, the plaintiffs demanded their lawful shares and however, the defendants had not come forward to partition their shares to which the plaintiffs are entitled to qua the suit properties and on verification of the encumbrance certificate, the plaintiffs came to understand that the defendants 1 to 3 had executed a settlement deed dated 05.10.2012 in respect of the suit properties in favour of the 4th defendant, however, the defendants 1 to 3 are not entitled to settle the suit properties in favour of the 4th defendant as recited therein and the abovesaid settlement deed is not valid in the eyes of law and the plaintiffs are not the parties to the same and the settlement deed had not come into force and the same had been created only with a view to deprive their lawful share qua the suit properties and hence, according to the plaintiffs, they had been necessitated to file the suit against the defendants for appropriate reliefs.

5.The 4th defendant resisted the plaintiffs' suit contending that the relationship between the parties as pleaded in the plaint is true and also admitted that Subramanian died on

09.02.2011 leaving behind the plaintiffs and the first defendant as his legal heirs and disputed the case of the plaintiffs that it was only Subramanian, who was looking after the needs of Muthusamy during his life time and further, disputed that Muthusamy had executed a Will bequeathing 1/5th share in the suit properties in favour of the plaintiffs 2 & 3 by way of the Will dated 10.02.2011 and accordingly, put forth that the abovesaid Will had been fabricated by the plaintiffs and the same is not true, valid and binding upon the 4th defendant. The 4th defendant also disputed the case of the plaintiffs that after the demise of Muthusamy on 25.02.2011, the plaintiffs 2 & 3 had been enjoying the share in the suit properties and further disputed the claim of the plaintiffs that they are entitled to 23/60 share in the suit properties. According to the 4th defendant, the plaintiffs are in toto entitled to only 6/25 share in the suit properties and by virtue of the settlement deed dated 05.10.2012 executed by the defendants 1 to 3 in favour of the 4th defendant, the 4th defendant is entitled to 19/25 share in the suit properties and the settlement deed dated 05.10.2012 is valid and binding upon the plaintiffs and the plaintiffs are not entitled to challenge the same and on the demise of Subramanian, the plaintiffs cease to be the members of the coparcenary and therefore, the plaintiffs are not entitled to claim more than 6/25 shares in the suit properties and the remaining 19/25 shares belong to the 4th defendant and the plaintiffs have no cause of action to lay the suit and the suit is liable to be dismissed.

6. 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 plaintiffs are entitled to claim partition and separate possession of 23/60 share in the suit properties as prayed for?

(2). Whether the plaintiffs are entitled to obtain the preliminary decree in respect of 23/60 share in the suit properties as claimed?

(3). Whether the plaintiffs are entitled to obtain permanent injunction as prayed for?

(4).Whether the Will dated 10.02.2011 has been created and is true and valid?

(5).Whether the settlement deed dated 05.10.2012 is invalid and not come into force and not binding upon the plaintiffs?

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

7.In support of the plaintiff's case, PWs1 to 3 were examined and Exs.A1 & A7 were marked. On the side of the defendants, DWs1 was examined and Exs.B1 was marked.

8.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 plaintiffs are entitled to 23/60 shares in the suit properties and also entitled to obtain the relief of permanent injunction as prayed for and accordingly, granted the preliminary decree in favour of the plaintiffs without cost. Impugning the same, the first appeal has been preferred by the 4th defendant.

9.The following points arise for determination in this first appeal:

"(1).Whether the Will dated 10.02.2011 is true, valid and binding upon the defendants?

(2).Whether the settlement deed dated 05.10.2012 is true, valid and binding upon the plaintiff?

(3).Whether the plaintiffs are entitled to obtain the partition and separate possession of 23/60 shares in the suit properties as prayed for?

(4).Whether the plaintiffs are entitled to obtain the permanent injunction as claimed in the plaint?

(5).To what relief the plaintiffs are entitled to?

(6).To what relief the 4th defendant/appellant is entitled to?"

10.Point Nos.1 to 4

The relationship between the parties is not in dispute. It is also not in dispute that the suit properties had been allotted to the share of Muthusamy in the family partition effected on 29.11.1969 and the abovesaid partition deed has been marked as Ex.A1. Thus, only by way of Ex.A1, it is put forth by both the parties that the suit properties had been acquired, treated and enjoyed as the joint family properties of Muthusamy and his family members. The first defendant is the wife of Muthusamy. The defendants 2 to 4 and the deceased Subramanian are the children of Muthusamy. Subramanian died on 09.02.2011 leaving behind his wife, the first plaintiff and children, the plaintiffs 2 & 3 and his mother, the first defendant as his legal heirs. According to the plaintiffs, it was only Subramanian, who was looking after Muthusamy and the first defendant providing their needs and on his demise, Muthusamy bequeathed his share in the suit properties in favour of the plaintiffs 2 & 3 by way of a Will dated 10.02.2011 and on the abovesaid factors in toto, according to the plaintiffs, they are entitled to obtain 23/60 shares in the suit properties. The Will dated 10.02.2011 has been marked as Ex.A2 and the contesting defendant viz., the 4th defendant is impugning the truth and validity of the abovesaid Will projected by the plaintiffs. In the light of the abovesaid rival claims, the plaintiffs being the propounders of Ex.A2 Will, the onus is upon the plaintiffs to establish the truth and validity of the same. To sustain their claims that Muthusamy had bequeathed his share in the suit properties in favour of the plaintiffs 2 & 3 by way of Ex.A2 Will, the plaintiffs had examined the scribe of the Will as PW2 and one of the attestors to the same as PW3 and the scribe has clearly deposed about the execution of the Will by Muthusamy on 10.02.2011 and the preparation of the Will by him as per the instructions given by Muthusamy and further, he would also depose that after the Will had been prepared and typed by him, the contents of the same were read over to Muthusamy and after acknowledging the contents of the same, Muthusamy had executed the Will in the presence of the attestors viz., Murugesan and Govindaraj and the execution of the Will by Muthusamy had been witnessed by the attestors and the attestation of the Will by the attestors had also been witnessed by Muthusamy and the Will Ex.A2 had been prepared only as per the directions of Muthusamy and considering the evidence of PW2 in toto and despite the cross examination, the 4th defendant

having not culled out anything from his mouth to discredit his evidence with reference to the abovesaid aspects spoken to by him and in such view of the matter, it is seen that trial Court is justified in placing reliance for upholding the truth and validity of Ex.A2 Will.

11. Not stopping, the plaintiffs have also chosen to examine Govindaraj as PW3, one of the attestors to the Will and PW3 has also tendered evidence as regards the preparation of the Will by PW2 Palanisamy as per the directions of Muthusamy and Muthusamy had by way of the Will bequeathed his share in the suit properties in favour of his grandsons viz., the plaintiffs 2 & 3 and the Will had been executed by Muthusamy after acknowledging the same and the same had been witnessed by him and the other attestor viz., Murugesan and their attestation had been witnessed by Muthusamy and considering the abovesaid evidence of PW3 in toto, it is seen that his evidence had satisfied the requirements of the proof of execution of the Will Ex.A2 by Muthusamy and the attestation of the same by the attestors in the manner known to law and in spite of the cross examination, the 4th defendant has not placed any material to disbelieve his evidence and not culled out any information from his mouth in support of his version and accordingly, considering the evidence of PW3, they being complimentary to the evidence of PW2, in all, it is found that the trial Court is wholly justified in accepting the truth and validity of Ex.A2 Will based on the evidence of PWs 2 & 3. As above pointed out, when Muthusamy is found to be entitled to 1/5th share in the suit properties, he is entitled to convey the same by way of Ex.A2 and accordingly, the plaintiffs having sustained and established the truth and validity of Ex.A2 Will by projecting the evidence of PWs 2 & 3 and in such view of the matter, the trial Court is found to be wholly justified in upholding the same and correctly determined that the plaintiffs are entitled to the share based on the said Will also.

12. The plaintiffs' counsel during the course of his arguments would contend that when with reference to the Will projected by the plaintiffs, the same having been established as per law, the Court should not endeavour to recreate the Will, which, in its opinion, ought to have made on the part of the testator and according to him, the same would result in creation of a new Will without any basis or justice and in this connection, relied upon the decision of the privy counsel reported in *Suna Ana Arunachellam Chetty and others V. S.R.M. Ramaswami Chetty*, 1916 Indian Cases (Vol. XXXV) PC 1. and the position of law as outlined in the abovesaid decision has

been extracted below:

"When a Will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of Will that the man ought, in the opinion of the Court, to have made and once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests, with him, and it is not for any Court to try and discover whether a Will could not have been made more consonant either with reason or with justice."

The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the case at hand.

13. The 4th defendant has not disputed that the plaintiffs are not entitled to claim any share in the suit properties. According to the 4th defendant, at the most, the plaintiffs would be entitled to claim only 6/25 share in the suit properties and the remaining 19/25 share belong to him and for the same, the 4th defendant would rely upon the settlement deed dated 05.10.2012 said to have been executed in his favour by the defendants 1 to 3 and the abovesaid settlement has been marked as Ex.B1. It is found that the suit properties had not been divided amongst the family members so far, in such view of the matter, when the 4th defendant claim a larger share in the suit properties based on Ex.B1 settlement deed and when at the time of the alleged execution of Ex.B1 settlement deed, the suit properties remain undivided, in such view of the matter, as rightly put forth by the plaintiffs' counsel, when the plaintiffs are not parties to the abovesaid settlement deed and the plaintiffs consent having also not been secured before the execution of the abovesaid settlement deed, even assuming for the sake of arguments that the abovesaid settlement deed had been executed in favour of the 4th defendant by the defendants 1 to 3, however, the position of law being that the gift by a coparcener of his undivided coparcenary interest to another coparcener without the consent of other coparceners being void, in such view of the matter, no credence could be fastened on the settlement deed projected by the 4th defendant and to expatiate the abovesaid position of law as regards the validity of the Will executed by coparcener without the consent of the other

coparcener. The plaintiffs' counsel would rely upon the decision reported in (1987) 3 Supreme Court Cases 294 (Thamma Venkata Subbamma (Dead) By Lr Vs. Thamma Rattamma and others). The position of law with regards to the void nature of the settlement deed effected by coparcener without the consent of the other coparcener has been discussed in the abovesaid decision and the same is extracted below:

"Hindu Law - Alienation of coparcenary property - Gift - Mitakshara law - Gift by a coparcener of his undivided coparcenary interest to another coparcener without consent of other coparceners void - Hindu Succession Act, 1956, Sections 6 and 30."

11. In Ramanna v. Venkata, ILR 11 Mad. 246 a Hindu made a gift of certain land which he had purchased with the income of ancestral property, and a suit was brought to recover the land on behalf of his minor son, who was born even seven months after the date of the gift. It was held that the gift was invalid as against the plaintiff, and that he was entitled to recover the land from the donee. Thus, a son, who was born to the family after the gift was made, was held entitled to recover the property from the donee. In other words, he would not be bound by such an alienation. Again, in Rottala Runganathan Cheuy v Pulicat Ramasami Chetti, ILR 27 Mad. 162, it has been held that it is not competent to an individual member of a Hindu family to alienate by way of gift his undivided share or any portion thereof; and such an alienation, if made, is void in toto.

12. There is a long catena of decisions holding that a gift by a coparcener of his undivided interest in the coparcenary property is void. It is not necessary to refer to all these decisions. Instead, we may refer to the following statement of law in Mayne's Hindu Law, Eleventh Edition, Article 382:

"It is now equally well settled in all the Provinces that a gift or devise by a coparcener in a Mitakshara family of his undivided interest is wholly invalid....A coparcener cannot make a gift of his undivided interest in the family property, movable or immovable, either to a stranger or to a relative except for purposes warranted by special texts.

13.We may also refer to a passage from Mulla's Hindu Law, Fifteenth Edition, Article 258, which is as follows:

"Gift of undivided interest.-- (1) According to the Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether there is no estoppel or other kind of personal bar which preclude the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of the other coparceners."

14.Considering the position of law as regards the void nature of the settlement deed executed by a coparcener without the consent of the other coparcener, accordingly, when it is found that the settlement deed relied upon by the 4th defendant for claiming a larger share in the suit properties is a void document and the defendants 1 to 3 are not entitled to convey their share in favour of the 4th defendant by way of the abovesaid settlement deed and furthermore, when Muthusamy had already bequeathed his share in respect of the suit properties in favour of the plaintiffs 2 & 3 by way of Ex.A2 Will, in all, it is found that as determined by the trial Court, the claim of larger share in respect of the suit properties on the part of the 4th defendant by virtue of Ex.B1 settlement deed as such

cannot be legally countenanced and the same had been correctly assessed and analysed by the trial Court and rightly determined that the settlement deed dated 05.10.2012 is not valid and binding upon the plaintiffs.

15. In the light of the abovesaid discussions, I hold that the Will dated 10.02.2011 is true, valid and binding on the defendants. I further hold that the settlement deed dated 05.10.2012 is not valid and binding upon the plaintiffs and I therefore hold that the plaintiffs are entitled to obtain the partition and separate possession of 23/60 share in the suit properties as prayed for. I further hold that the plaintiffs are entitled to obtain the relief of permanent injunction as claimed in the plaint. Accordingly, point Nos.1 to 4 are answered.

16. Point Nos.5 & 6

For the reasons aforesaid, the judgment and decree dated 28.02.2014 passed in O.S.No.196 of 2012 on the file of the Additional District Court, Namakkal (Full Additional in charge), are confirmed and 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

sms

To
The Additional District Judge Namakkal
(Full Additional in charge)
Copy to

The Section Officer, V.R.Section, High Court, Madras.

+1 cc to Mr.N.Manoharan Advocate sr103784

A.S.No.699 of 2014

aa02/09/2020

10/10