

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.10.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No. 386 of 2014

1.Shanthi

2.Thilagavathi ...Appellants/Defendants

Vs.

1.Minor Gobika

2.Chitra ...Respondents/Plaintiffs

Prayer: Memorandum of Second Appeal filed under Section. 100 of C.P.C. against the judgment and decree dated 12.04.2013 made in A.S.No. 117 of 2012 on the file of the Principal District Court, Erode modified the finding of the judgment and decree dated 26.07.2011 made in O.S.No.225 of 2009 on the file of Principal Sub Court, Erode.

For Appellants : Mr.M.Guruprasad

For Respondents : Mr.P.Valliappan

J U D G M E N T

The defendants in O.S.No.225 of 2009 having suffered a preliminary decree for partition and separate possession of 10/18th share of the plaintiffs in the suit properties have come up with this second appeal.

2. According to the plaintiffs, the suit properties originally belonged to Kakkayan @ Perumal Pillai, who died leaving behind three sons, K.P.Shanmugham, Palaniswamy and Arumugham. The parties to the present proceedings are only the legal heirs of K.P.Shanmugam, who died on 10.06.2005 leaving behind his son Meenakshi Sundaram, daughter Shanthi and his wife Thilagavathi. Meenakshi Sundaram, son of K.P.Shanmugam died on 11.08.2006 leaving behind the plaintiffs 1 and 2, daughter and wife respectively. According to the plaintiffs, on the death of Meenakshi Sundaram on 11.08.2006 they would be together be entitled to 10/18th share in the suit properties. Since the

defendants did not accede to the request of the plaintiffs for a partition, the above suit came to be filed.

3. The suit was resisted by the defendants contending that Meenakshi Sundaram had executed a Will bequeathing half share in the suit properties in favour of his mother Thilagavathi on 02.12.2005 and as such the plaintiffs are not entitled to claim any share in the suit properties. It is also further contended that on and from the date of commencement of the Hindu Succession Act 39 of 2005, the first defendant, being the daughter of K.P.Shanmugam would also become a Co-parcener and she would be entitled to equal share with Meenakshi Sundaram. On the above pleadings, the defendants sought for dismissal of the suit.

4. At a trial, the second plaintiff was examined as P.W.1 and Exs.A1 to A3 were marked. Ex.A1 is the partition deed between K.P.Shanmugam and his brothers. Ex.A2 is the release deed executed by Thilagavathi in favour of Shanthi/1st defendant on 11.09.2006 after the death of Meenakshi Sundaram. Ex.A3 is the death certificate of Meenakshi Sundaram. The defendants examined themselves as D.W.1 and D.W.2 and they have also examined one Kanagaraj, who is the attesting witness to the Will dated 02.12.2005. While the Will was marked Ex.B4, original of Ex.A2 release deed was marked as Ex.B1. Kist Receipts, which stood in the name of first defendant were marked as Ex.B2. Ex.B3 is the birth certificate of the Perumal Pillai. Ex.B5 is the copy of the petition in H.M.O.P.No.174 of 2005.

5. The Trial Court, upon consideration of the evidence on record concluded that the Will dated 02.12.2005 has not been proved in accordance with law. According to the Trial Court, in the absence of explanation regarding non-registration of the Will creates a doubt regarding the execution of the Will by Meenakshi Sundaram. The Trial Court also rejected the contention of the defendants that the first defendant, daughter of K.P.Shanmugam would become a co-parcener. On the said conclusions, the trial Court granted a preliminary decree declaring 8/27th share of the first plaintiff and 2/27th share of the second plaintiff in the suit properties. Aggrieved the defendants preferred an appeal in A.S.No.117 of 2012. The lower Appellate Court agreed with the findings of the Trial Court on both the counts, it however, modified the judgment and decree of the Trial Court granting 10/18th share to the plaintiffs. Aggrieved, the defendants have come up with this second appeal.

6. The following questions of law were framed by this Court on 18.06.2014:

"1.It is right on the part of the Courts below to disbelieve the Will Exhibit B4 when the

appellants/defendants had evinced its authenticity and validity as postulated under Section 68 of Indian Evidence Act and Section 63 c of the Indian Succession Act?

2. Whether the Courts below are right in holding that the 1st appellant is not entitled to equal share in ancestral property when the concept of the notional partition is no more res integra in view of the propositions made in Gandhuri Koteshwaramma case 2011 (6) CTC 102 (SC), prema vs. Nanje Gowda 2011 (6) SCC 462 and Santhamani vs. Saradamani 2013 (2) CTC 641?"

7. Heard Mr.M.Guruprasad, learned counsel appearing for the Appellants and Mr.P.Valliappan, learned counsel appearing for the respondents.

8. Mr.M.Guruprasad, learned counsel appearing for the appellants elaborating on the questions of law would contend that Lower Appellate Court was not right in rejecting the Will solely on the ground that it purports to deal with entire half share of Meenakshi Sundaram. He would also point out that under Section 30 of the Hindu Succession Act, a Hindu Co-parcener is entitled to bequeath his share in the Co-parcenary property. A will executed by such Co-parcener will not be invalid on that ground alone. It can be given effect to the extent of the share of the Co-parcener in the properties. Therefore, according to him, the Lower Appellate Court was not right in rejecting the Will solely on the ground that it purports bequeath more than what the Meenakshi Sundaram was entitled to. On the second question of law, Mr.Guruprasad would submit that the first appellant would also be entitled to a equal share in view of the judgments of the Hon'ble Supreme Court of India in Gandhuri Koteshwaramma & Another Vs. Chakiri Yanadi & Another reported in 2011(6) CTC 102 (SC) and Santhamani Vs. Saradamani 2013 (2) CTC 641.

9. Contending contra, Mr.P.Valliappan, learned counsel appearing for the respondents/plaintiffs would submit that the Trial Court had disbelieved the Will on the ground that execution of the Will has not been proved beyond suspicion. He would also point out that the testator, who was only 32 years old and he died within one year of the execution of the Will in an accident. Relying upon the fact that the Will is unregistered, Mr.P.Valliappan would submit that there is a possibility of the Will having been created after the death of the testator. The lower Appellate Court has not specifically reversed the conclusion of the Trial Court. The Lower Appellate Court has only supplied an additional reason for disbelieving the Will.

10. On the second question of law relating to the right of the daughter namely the first defendant, the learned counsel would submit that subsequent decisions of the Hon'ble Supreme Court of India in the case of Prakash and Others Vs. Phulavati and Others reported in (2016) 2 SCC Page 36 and Danamma Alias Suman Surpur and Another vs. Amar reported in (2018) 3 SCC Page 343 have categorically laid down that in order to enable a daughter to claim a share equal to that of co-parcener, it should be shown that her father was alive on 09.09.2005, when the Amendment Act came into force. The said decision was also confirmed by the Hon'ble Supreme Court in the case of Mangammal Alias Thulasi and Another vs. T.B.Raju and Others reported in (2018) 15 SCC Page 662. It is also not in dispute that the issue relating to the entitlement of a daughter whose father had died prior to 09.09.2005 under the Act 39 of 2005 to is the subject matter of a reference to a larger bench of the Hon'ble Supreme Court of India. But as of today, the law declared by the Hon'ble Supreme Court of India is that if the daughter is to be given the benefit of amendment Act, it should be shown that her father was alive on 09.09.2005, namely on the date on which the Act came into force.

11. I have considered the rival submissions. The execution of Ex.B-4 Will itself is shrouded by suspicious circumstances. No doubt true that the relationship between the second plaintiff and the deceased Meenakshi Sundaram was not cordial and they were living apart. Proceeding under the Hindu Marriage Act was also pending when Meenakshi Sundaram died. As rightly pointed out by the Trial Court, the matrimonial discord cannot be the sole ground to disinherit the only daughter. Under the said circumstances, the burden on the defendants to prove the Will beyond all reasonable suspicion is more. DW-3 claims to be the attesting witness. His proof affidavit reads as follows:

“மீனாட்சி சுந்தரம் னை% 02.12.2005 தேதியிட்ட உயில் சாசனத்தில் கைரேகை வைத்ததை நானும். மற்றொரு சாட்சியான கொடுமுடியைச் சேர்ந்த சபாபதி என்பவரும் பத்திர எழுத்தர் ராஜேந்திரனும் நேரில் கண்டுற்றோம், அதுபோல நானும். சபாபதியும் பத்திர எழுத்தர் ராஜேந்திரனும் ஒருவர் கையெழுத்து செய்ததை மற்றவர்கள் நேரில் பார்த்தோம்,”

12. Section 63 of the Indian Succession Act deals with execution of Wills. Clause C of Section 63 reads as follows:

“(c)The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and

each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

From the above, it is clear that in order to prove execution of a Will, the testator must have signed in the presence of the attesting witnesses or the person authorised by the testator affixed his / her mark in the presence of the attesting witness (or) the attesting witness must have obtained personal acknowledgement regarding execution of the will from the testator (or) the attesting witness must have affixed their signatures to the Will in the presence of the testator. If any one of these requirements are absent then it cannot be said that the will has been duly proved.

13. A perusal of the portion of the evidence D.W.3 extracted above would show that the requirements that the testator must have seen the attestors signing the Will is totally absent. All that the attesting witness, DW-3 has said is that the attesting witness saw testator signing the Will and the attesting witnesses saw each other signing the Will. The proof affidavit does not state that the testator was present at the time of attestation and the attesting witnesses signed in his presence. In the absence of the said requirement, it cannot be said that the execution of Will has been proved in accordance with law. Though this was not adverted to by the Courts below on reassessment of the evidence, I find that the essential requirement of execution of Will is absent and as such the Will cannot be said to have been properly executed. Hence, the first question of law is answered against the appellants. On the second question, as rightly pointed out by Mr.P.Valliappan, learned counsel appearing for the respondents, the Hon'ble Supreme Court of India in all the subsequent decisions referred to supra had held that a daughter of Hindu male would become a co-parcener by virtue of Act 39 of 2005 only if it is shown that her father was alive on 09.09.2005. On facts it is found that K.P.Shanmugam father of the first defendant died on 18.06.2005 therefore, the first defendant cannot claim as a co-parcener. She would only inherit the interest of K.P.Shanmugam under Section 8 of Hindu Succession Act on his death. It is also stated by the learned Counsel for the Appellants that Shanthi got married prior to 25.03.1989 and as such she would not be entitled to the benefits of the Hindu Succession Amendment Act 1 of 1990 as introduced in Tamil Nadu also. Hence the second question of law is also answered against the appellants.

14. It is thus become necessary to decide the shares, the parties would be entitled. Both the Courts below have not

worked out the shares properly. K.P.Shanmugam died 18.06.2005 leaving behind Meenakshi Sundaram / Son, Shanthi/daughter, and Thilagavathi / Wife. The character of the properties as ancestral in the hands of K.P.Shanmugam is admitted. Therefore, a notional partition as per Section 6 of the Hindu Succession Act has to be assumed. At the notional partition, K.P.Shanmugam will take half share and Meenakshi Sundaram will get the other half share. On the death of K.P.Shanmugam on 18.06.2005, Meenakshi Sundaram, Shanthi and Thilagavathi would get $1/3^{\text{rd}}$ of the half share obtained by K.P.Shanmugam. Thus, each one of them would get $1/6^{\text{th}}$ share. On her birth, Minor Gobika would become a co-parcener along with her father on and from 09.09.2005. Therefore, she would be entitled to half share in the half share obtained by the Meenakshi Sundaram as a co-parcener under Section 6 of the Hindu Succession Act. Thus, minor Gobika and Meenakshi Sundaram would be entitled to $1/4^{\text{th}}$ share. On the death of Meenakshi Sundaram, his $1/4^{\text{th}}$ share and the $1/6^{\text{th}}$ share inherited by him on the death of K.P.Shanmugam would devolve under Section 8 equally on minor Gobika, the daughter, Chitra, the second plaintiff (widow) and Thilagavathi, his mother. Thus, worked out minor Gobika would get $1/4^{\text{th}} + 5/36^{\text{th}}$ equivalent $14/36$ shares. The second plaintiff wife of Meenakshi Sundaram will get $5/36$ shares so the plaintiff's put together would be entitled to $19/36^{\text{th}}$ shares while, the mother of Meenakshi Sundaram namely, Thilagavathi would get $11/36^{\text{th}}$ and his sister Shanthi, the first defendant would get $6/36^{\text{th}}$ shares.

15. In view of the above, the appeal is partly allowed declaring the plaintiffs $19/36^{\text{th}}$ shares in the suit properties. However, considering the relationship between the parties there shall be no order as to costs. It is made clear that the settlement deed executed by the second defendant in favour of the first defendant would be valid in respect of the share that she is entitled to.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

Pns

To:-

1. The Principal District Court,
Erode.

2.The Principal Sub Court,
Erode.

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

+lcc to M/s.P.Valliappan, Advocte Sr.89888

+lcc to M/s.M.Guruprasad, Advoate Sr.89525

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srg 28/07/2020



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