

IN THE HIGH COURT OF JUDICATURE AT MADRAS
JUDGMENT RESERVED ON : 26.11.2019
JUDGMENT PRONOUNCED ON : 29.11.2019

CORAM

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.60 of 2014

Alli Sekar alias Sekar ..Appellant/1st Defendant

Vs.

1.Ramu

Represented by his Power Agent
Rajeswari Ammal

2.Selvaraj

3.Menaka

4.Rajesh

5.Guhan alias Mohan

6.Thirugnanam ..Respondents/Plaintiff & Defendants 3 to 7

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree passed in O.S.No.189 of 2005 dated 29.08.2012 on the file of the Court of District Munsif, Sirkali as confirmed in A.S.No.95 of 2012 dated 29.07.2013 on the file of the Court of Principal Subordinate Judge, Mayiladuthurai.

For Appellant : Mr.A.Muthukumar

For Respondents: Mr.S.Sounthar for R1
Mr.P.Anbarasan for R2 to R5

J U D G M E N T

The 1st defendant in O.S.No.189 of 2005 having suffered a decree for partition and separate possession of 1/3rd share each of the plaintiff and the defendants 3 to 6 together at the hands of the courts below has come up with this Second Appeal.

2. The plaintiff/ 1st respondent is represented by his power agent. The suit is one for partition and separate possession of his 1/3rd share on the following pleadings:-

The suit properties originally belonged to late Kanagayal W/o. Ayyasamy. The item Nos.1 to 7 were purchased by Kanagayal in her name under various sale deeds marked as Ex.A4 and Ex.A5. As regards item No.8, the plaintiff would contend that Kanagayal had entered into an agreement with one Kannan and since the said Kannan did not come forward to execute the sale deed as per the agreement, she had filed a suit in O.S.No.110 of 1976 seeking specific performance. The said suit was decreed. However, the sale deed was taken in the name of the 1st defendant. Therefore, according to the plaintiff, the suit properties are the absolute properties of Kanagayal who died leaving behind the plaintiff and the defendants 1 and 2 as her legal heirs.

3. Since the 2nd defendant Kumadhavalli @ Kumudha died pending suit, the defendants 3 to 6 were impleaded as her legal representatives. The 7th defendant was impleaded on the plea that he has purchased item Nos.4 to 7 from the 1st defendant. It was claimed that the sale by the 1st defendant in favour of the 7th defendant is not binding on the plaintiff. On the above contentions, the plaintiff sought for partition as stated above.

4. The defendants 3 to 6 who were impleaded as legal representatives of the deceased 2nd defendant conceded the case of the plaintiff and sought for partition of their 1/3rd share also as legal representatives of the deceased 2nd defendant.

5. The 1st defendant filed a written statement contending that the suit as framed is not maintainable. According to the 1st defendant, the father of the parties and husband of Kanagayal viz., Ayyasamy was working in Singapore and the suit properties were purchased in the name of Kanagayal out of the monies that were sent by him. Therefore, according to the 1st defendant, Kanagayal was not the absolute owner of the suit properties.

6. It is the further claim that Ayyasamy even during his life time had executed a registered Will on 22.06.1987 bequeathing certain properties in favour of the 1st defendant as well as the plaintiff. As per the said Will item Nos.1 to 3 of the suit properties were allotted to the 1st defendant and the 1st defendant has been enjoying the said properties as absolute owner thereof pursuant to the said Will.

7. Apart from the Will, Ayyasamy had also executed a Kor Chit by which he had allotted certain properties to the plaintiff and the 1st defendant. The 1st defendant would further contend that all the properties had been divided and there was no property left to be partitioned in the family. The 1st defendant also pleaded that item Nos. 4 to 7 are not in his possession.

8. He has also pleaded that Ayyasamy had executed another unregistered Will on 18.05.1991. Under the said Will, Ayyasamy had bequeathed the properties that were retained by him to the plaintiff as well as the 1st defendant. It is claimed that the 1st defendant had also sold the properties bequeathed to him to the 7th defendant Thirugnanam. Therefore, according to the 1st defendant, item Nos.4 to 7 of the suit properties are in possession of Thirugnanam.

9. It was further contended that the house site that was purchased from one Palanisamy Gurukkal of Allivilagam Village was given to the plaintiff. The plaintiff and his wife had sold some of the properties allotted to them or bequeathed to them by Ayyasamy. It was also contended that the plaintiff has not included the properties that were bequeathed to him by Ayyasamy in the suit. It was claimed that since some of the properties are omitted to be included, the suit itself is bad for partial partition.

10. As regards the claim of the legal heirs of the 2nd defendant, the 1st defendant would contend that the 2nd defendant was married in the year 1978 and at the time of marriage, huge sums were spent on her marriage as well as Sreedhana and therefore, the 2nd defendant had executed a release deed dated 08.05.1979 in favour of the plaintiff and the 1st defendant. Therefore, the 2nd defendant is not entitled to any share in the property. To buttress the said claim, the 1st defendant also referred to the contents of the Will dated 22.06.1987 said to have been executed by Ayyasamy.

11. As regards the 8th item it was contended that the said property belongs absolutely to the 1st defendant and the plaintiff cannot plead that it is a benami purchase. Additional written statement was filed by the 1st defendant contending that the property purchased from Gurukkal and other family properties were not included in the suit and hence, the suit is bad for partial partition.

12. At trial, the power agent of the plaintiff/ his wife was examined as PW1. Ulaganathan, Manoharan and Sundaramoorthy were examined as PW2 to PW4. The 1st defendant was examined as DW1. One Ilangeswaran was examined as DW2. Since he did not subjected himself to cross examination his evidence was eschewed. Govindasamy and Natarajan were examined as DW3 and DW4.

13. The trial court on a consideration of the evidence on record concluded that the 1st defendant had not proved the Wills dated 22.06.1987 and 18.05.1991 as required under law. The trial court also found that the suit item No.8 was purchased in

the name of the 1st defendant pursuant to the decree in O.S.No.110 of 1976 and therefore, it should also be treated as property of Kanagayal. As such the plaintiff as well as the defendants 3 to 6 would be entitled to a share in the suit properties.

14. The claim of the 1st defendant regarding partial partition was also rejected by the courts below, on the ground that DW1 in his evidence had admitted that except the property found included in Ex.B8 and Ex.B14 Wills, the family had no other properties to be divided. As regards the property purchased from Gurukkal, the courts below found that the said property was purchased by the plaintiff in his name out of his own income. Hence, the said property cannot be made subject matter of partition. It is against these concurrent findings of the courts below, the 1st defendant has come up with this Second Appeal.

15. Notice of motion was ordered on 24.03.2014. Pursuant to the same, Mr.S.Sounthar, learned counsel has entered appearance for the 1st respondent and Mr.P.Anbarasan, learned counsel has entered appearance for the respondents 2 to 5. The 6th respondent, Thirugnanam though served is not appearing either in person or through counsel duly instructed.

16. Upon hearing the counsel on either side, the following questions of law were framed in the appeal:

1. Whether the courts below were right in not considering the claim of the defendants that the suit properties were purchased in the name of Kanagayal out of the monies earned by Ayyasamy who was admittedly employed in Singapore?

2. Whether the suit as laid is bad for partial partition?

17. Both the counsel addressed arguments on the questions of law so framed. Mr.A.Muthukumar, learned counsel appearing for the appellant while elaborating on the questions of law would submit that the courts below have not considered the evidence to the effect that the suit properties were purchased from and out of the monies sent by Ayyasamy from Singapore.

18. He would also contend that the courts below were not right in dis-believing the Wills executed by the father on 22.06.1987 (Ex.B8) and on 18.05.1991 (Ex.B14). It is also claimed that the execution of Ex.B8, Will has not been disputed by the defendants and therefore, the courts below were not right in concluding that the Wills have not been proved in accordance

with law.

19. As regards Ex.B8, Will, Mr.A.Muthukumar would draw my attention to the evidence of PW1, wherein she had admitted the signatures of Ayyasamy in the said Will. The relevant portion of the cross examination reads as follows:-

"22.06.1987 தேதியிட்ட உயிலிள் உள்ள கையெழுத்துக்கள் அய்யாசாமி கையெழுத்தா என்றால் ஆமாம் என்று சாட்சி சொல்லுகின்றார் அதன் பொருட்டு அந்த அய்யாசாமி கையெழுத்துக்கள் மட்டும் பிசா.ஆ.1 முதல் பிசா.ஆ.4 என குறியீடு செய்யப்படுகின்றது. "

20. Relying upon the said admission, Mr.A.Muthukumar, learned counsel would contend that the courts below were not right in concluding that the 1st defendant has not proved the execution of the Will dated 22.06.1987.

21. Contending contra Mr.S.Sounthar, learned counsel appearing for the 1st respondent would submit that being a Will, Ex.B8 should be proved in the manner required under Sections 68 or 69 or 71 of the Evidence Act. He would also draw my attention to the evidence of the attesting witness viz., DW4, who is the son of the attesting witness and contend that he has not identified the signature of the attesting witness in the original Will.

22. Mr.S.Sounthar, would contend that the provisions of Section 69 of the Evidence Act regarding the proof of Will has not been complied with. The proof affidavit filed by DW4 reads as follows:-

"இவ்வழக்கு வாதி ராமு மற்றும் முதல் பிரதிவாதி சேகர் (எ) அல்லிசேகர் ஆகியோரின் தந்தை அய்யாசாமி என்பவர் எழுதி வைத்த 22.06.1987-ம் தேதியிட்ட உயில் பத்திரத்தின் ஜெராக்ஸ் நகலை நான் பரிசீலித்தவரையில் அதில் சாட்சி கையெழுத்து போட்டு உள்ள வீரபத்திர முதலியார் எனது தகப்பனார் ஆவார். அதில் உள்ளது எனது தகப்பனார் கையெழுத்து ஆகும், மற்றப்படி உயில் பற்றிய விவரம் எனக்கு நேரடியாகத் தெரியாது."

23. A perusal of the above evidence would show that the original Will has not been shown to the witness DW4. He has filed his proof affidavit based on the xerox copy of the Will. No attempt has been made to show the Will to the witness and require him to identify the signature of his father as attestor to the instrument.

24. Section 68 to 71 lay down special rules of evidence required for proving the documents that are required to be attested by law. While Section 68 requires atleast one of the attesting witnesses to be examined. Section 69 provides for the

contingency where attesting witnesses are either dead or are not capable of testifying before the court.

25. Admittedly, in the case on hand, the attesting witnesses to Ex.B8 Will are dead. Then it is for the propounder, 1st defendant, to prove the Will either under Section 69 or Section 71 of the Evidence Act. Section 71 of the Evidence Act cannot be invoked in the case on hand as it would apply only when the attesting witness denies attestation or he is unable to recall the attestation. Therefore, the only provision which would enable the propounder viz., 1st defendant to prove the Will is Section 69 of the Evidence Act. Section 69 of the Evidence Act reads as follows:-

"69. Proof where no attesting witness found.-- If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person. "

26. A reading of the above provision would show that the mandatory requirement is that the witness examined should be able to identify the signatures of the attestors and the signature of the testator in the Will. Of course, it is not necessary that the same witness should identify both the signatures. Even though PW1 has admitted the signature of the testator found in Ex.B8 Will dated 22.06.1987, the attesting witness had not identified the signatures of the attestor found in the original Will and therefore, as rightly contended by Mr.S.Sounthar, learned counsel appearing for the respondent, the execution of the Will dated 22.06.1987 has not been proved in accordance with law.

27. As regards the Will dated 18.05.1991 marked as Ex.B14. It is an unregistered instrument. The 1st defendant has examined one Govindasamy as DW3 who figures as attesting witness to Ex.B14 to prove the said Will. But, the evidence of Govindasamy has been shattered in the cross examination. He had in fact deposed that there are differences in the signature of Ayyasamy found in Ex.B8 and Ex.B14. He is unable to remember the place where the Will is executed.

28. His evidence in my considered opinion is wholly insufficient to conclude that the execution of the Will dated 18.05.1991, Ex.B14 has been proved. I therefore conclude that the courts below were right in holding that the 1st defendant has miserably failed to prove the execution of two Wills viz., Ex.B8

and Ex.B14 by Ayyasamy.

29. Now coming to the questions of law framed, Mr.A.Muthukumar, learned counsel appearing for the appellant would contend that though there was a specific plea that the suit properties were purchased with the aid of the monies sent by Ayyasamy who was admittedly working in Singapore in the name of his wife Kanagayal, the courts below have not framed an issue on the said question. They have not gone into the said question also. Therefore, according to him, the failure on the part of the courts below to have framed an issue on the vital question of title, the judgments and decrees as rendered cannot be sustained.

30. Contending contra Mr.S.Sounthar, learned counsel appearing for the 1st respondent/ plaintiff would submit that the 1st defendant is precluded from raising such a plea in view of the provisions of Prohibition of Benami Property Transactions Act, 1988. According to the counsel, Section 3 of the Prohibition of Benami Property Transactions Act, 1988 as it stood prior to the amendment creates a presumption that any property purchased by a person in the name of his wife or unmarried daughter is presumed to have been purchased for the benefit of the wife or unmarried daughter unless the contrary is proved. Therefore, according to Mr.S.Sounthar, the burden is on the 1st defendant to show that the purchase was not made with an intention to benefit Kanagayal and the property was always treated as a family property.

31. These submissions of the counsel for the respondent is countered by Mr.A.Muthukumar contending that the very fact that the properties were bequeathed by Ayyasamy under his two Wills viz., Ex.B8 and Ex.B14 would show that the deceased Ayyasamy had treated the properties as his own properties and he has not recognized the title of Kanagayal.

32. I had concluded that the appellant/ 1st defendant has miserably failed to prove the execution of Ex.B8 and Ex.B14 Will by Ayyasamy. Therefore, the mere fact that Ayyasamy had executed the Wills in respect of the properties that stood in the name of Kanagayal would not have the effect of rebutting presumption that is raised under sub-Section 2 of Section 3 of the Prohibition of Benami Property Transactions Act, 1988 as it stood prior to the amendment.

33. No doubt, Mr.A.Muthukumar, would draw my attention to the evidence of PW3 who had deposed that the suit properties were purchased by the monies sent by Ayyasamy in the name of

Kanagayal. That evidence in cross examination alone cannot be taken as evidence strong enough to rebut the presumption under sub-Section 2 of Section 3 of Prohibition of Benami Property Transactions Act, 1988. Even though it is claimed that the monies were sent by Ayyasamy from Singapore there is no evidence on the side of the 1st defendant to establish the fact that the monies that were sent from Singapore by Ayyasamy were used to purchase the properties in the name of Kanagayal. Therefore, I do not think that the 1st defendant has established his plea that the monies were sent from Singapore by Ayyasamy and the suit properties were purchased by Kanagayal from and out of the monies sent by Ayyasamy.

34. The second question of law relates to partial partition. Mr.A.Muthukumar, learned counsel appearing for the appellant would vehemently contend that some of the items of properties which were subject matter of the Wills Ex.B8 and Ex.B14 have not been included in the suit. He would also further contend that the other properties standing in the name of Ayyasamy have not been made subject matter of the suit. Therefore, according to him the suit is bad for partial partition.

35. Mr.S.Sounthar, learned counsel appearing for the 1st respondent would however draw my attention to the evidence of DW1, wherein, he had admitted that there are no other properties available for partition, apart from properties that are subject matter of these two Wills. Relying upon the said evidence, Mr.S.Sounthar, would contend that the suit is not bad for partial partition.

36. Mr.S.Sounthar, would also contend that the suit relates to partition of estate of Kanagayal and therefore the non-inclusion of the properties that formed part of Ayyasamy's estate would not make the suit bad for partial partition.

37. It is clear from the evidence produced that all the properties subject matter of the Wills have not been included in the suit. The 'A' Schedule property found in the Will dated 22.06.1987 measuring about 1 acre 35 cents has not been included in the suit.

38. The answer to this non-inclusion is that the property belonged to Ayyasamy and therefore non-inclusion of it in this suit which is with reference to the estate of Kanagayal will not render the suit bad for partial partition. It is also pointed out that out of the 'B' schedule properties found in Ex.B8 Will only the first three items are made subject matter of the suit. Even there as regards item Nos.1 and 2 only a portion of it has

been included in the suit. According to Mr.S.Sounthar, only an extent of about 40 cents in the item Nos.1 and 2 and item No.3 belonged to Kanagayal. Hence, only 71 cents out of 1 acre 43 cents was made subject matter of the suit. The remaining property according to Mr.S.Sounthar belongs to Ayyasamy and his estate being not made subject matter of partition, the suit will not be bad for partial partition.

39. I am unable to agree with the said contention of Mr.S.Sounthar for the following reasons. Admittedly, Kanagayal pre-deceased Ayyasamy and Ayyasamy had inherited a share in the estate of Kanagayal. That share necessarily forms part of the estate of Ayyasamy. Therefore, this suit which was instituted after the death of Ayyasamy cannot be treated as a suit for partition of the estate of Kanagayal alone. It is a suit for partition of the portion of the estate of Ayyasamy which was inherited by him after the death of Kanagayal. Therefore, the plaintiff in my considered opinion should have sued for partition of the entire estate of Ayyasamy and Kanagayal.

40. If the plaintiff had filed the suit during the life time of Ayyasamy seeking partition and separate possession of the estate of Kanagayal, Ayyasamy would have been definitely entitled to 1/4th share. That 1/4th share now forms part of the estate of Ayyasamy. Therefore, the contention of the counsel that this suit being only for partition of the estate of Kanagayal cannot be said to be bad for partial partition because of the non-inclusion of the properties that stand in the name of Ayyasamy cannot be accepted.

41. In Gandhi Vs. Saminatha Gounder and another reported in 2006 (1) CTC 267, this court had held that the suit for partition must include the whole estate which is available. The plaintiff cannot be allowed to omit properties at his discretion and seek partition of only portion of the properties. While doing so this court had relied upon the judgment of the Hon'ble Supreme Court in Kenchegowda (since deceased) by legal representatives Vs. Sri Siddegowda @ Motegowda reported in JT 1994 (4) SC 125. In view of the aforesaid pronouncement of this court, I am constrained to answer the second question of law in favour of the appellant. In fine, the suit in O.S.No.189 of 2005 is held to be bad for partial partition.

42. The result of the answer to the 2nd question of law framed is that the suit will have to fail and hence, the Second

Appeal is allowed and the judgments and decrees of the courts below are set aside. The suit in O.S.No.189 of 2005 will stand dismissed as bad for partial partition. However, in the circumstances there will be no order as to costs.

Sd/-
Assistant Registrar(Insp.cell)

//True copy//

Sub Assistant Registrar

dsa

To

- 1.The learned District Munsif,
Sirkali.
- 2.The learned Principal Subordinate Judge,
Mayiladuthurai.
- 3.The Section Officer, V.R. Section,
High Court of Madras, Chennai 600 104.

+1cc to Mr.A.Muthukumar, Advocate SR.No.99913

+1cc to Mr.S.Sounthar, Advocate SR.No.100095

S.A.No.60 of 2014

SAI (CO)
GMY (04/02/2020)

सत्यमेव जयते
WEB COPY