

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.01.2020

CORAM

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH
AND
THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

A.S.No.785 of 2012

1.Loganayaki (died)
2.Kodilingam
3.Vijayalakshmi
4.Dhanalakshmi
5.Vetriselvi

... Appellants

Vs.

1.Sivasubramanian
2.Gunasundari

... Respondents

(Appellants 2 to 4 and Respondents
1 and 2 are recorded as LRs of the
deceased 1st appellant vide order
dated 09.12.2015 in the memo
in USR NO.8452&8453/15
filed in A.S.No.785 of 2012)

PRAYER : Appeal filed under Section 96 of C.P.C against the
judgment and decree of the learned Principal District Judge,
Nagapattinam, dated 17.12.2011 in O.S.No.29 of 2010.

सत्यमेव जयते

For Appellants : Mr.J.Alaguram Jothi
for Mr.K.Samidurai

For Respondents : Mr.P.R.Dinesh Kumar for R1
Mr.T.P.Senthil Kumar for R2

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

The appellants are defendants 1 to 3, 5 and 6. The suit has been filed for partition and separate possession by the first respondent being the plaintiff claiming 7/36 share of the suit properties, inter alia, holding that they are ancestral and joint family properties. Challenging the preliminary decree passed, the present appeal has been filed by the appellants.

2. For the sake of convenience, the parties are referred to as per their rank before the Trial Court.

3. The plaintiff is the brother of the defendants 2 to 5. The first defendant is the mother and the sixth defendant is the wife of the second defendant. The plaintiff contended that the suit properties are ancestral properties and joint family properties. It is the specific case of the plaintiff that there was an ancestral nucleus from which the other properties have been purchased in the name of himself, father, first defendant mother and the other defendants. The defendants contended that the suit properties are self-acquired properties. Some of the properties have been purchased in the name of the defendants and, therefore, the onus is on the plaintiff to prove to the contrary that the deceased father executed the Will in favour of the defendants. Similarly, the first defendant (since deceased) has executed the Will followed by a settlement deed.

4. The trial Court, upon hearing the parties, framed the following issues:-

"(i) Whether the plaintiff is entitled to partition as prayed for?

(ii) Whether the suit properties are joint family properties?

(iii) Whether the plaintiff has given earnings to the family for purchase of properties?

(iv) Whether the Item No.8 of the suit property is not the absolute property of one Somasundaram Gounder?

(v) Whether the 7, 9, 11, 12 and 13th item of the suit properties are not the separate properties of the 1st defendant?

(vi) Whether the settlement dated 27.07.2010 is not valid?

(vii) Whether the Will dated 09.06.2006 is not valid?

- (viii) Whether the court fee paid is correct?
(ix) To what relief?"

5. On behalf of the plaintiff, he examined himself as P.W.1 and marked Exs.A1 to A20. The defendants 1 to 3, 5 and 6 have marked Exs.B1 to B13 while examining D.W.1 to D.W.5.

6. The trial Court decreed the suit by taking note of the fact that some of the suit properties were admittedly ancestral properties. Therefore, there was sufficient nucleus to buy the other properties. Not only the properties stand in the name of the defendants including the first defendant, who is the mother but also the deceased father and the plaintiff himself. Much reliance has been made on the evidence of the first defendant who has deposed as D.W.2. She had deposed in her cross-examination, though taken as a stand in favour of the other defendants even beyond the pleadings made by her, that the income of the plaintiff was not sufficient and the properties have been purchased through the income derived from the ancestral properties. Thus, by recording the aforesaid statement made by her in the cross-examination, the trial Judge held that the suit properties are the ancestral and self-acquired properties.

7. The reliance made on the Will and the settlement deed was repelled by stating that the father of the plaintiff and defendants 1 to 3, 5 and 6 was in fact having very serious ailment. He was suffering from diffuse cerebral atrophy and has been taking treatment continuously. Further, he has diabetics, heart and kidney problems. Reliance has been made on Ex.A11, Ex.A15 which are the discharge summaries of the deceased father. Further, reliance have been made on Exs. A16 to A19 which are medical prescriptions and the Family Card indicating the name of the plaintiff. The evidence of D.W.3 was taken into consideration to prove the ailment of the deceased father having been admitted and thereafter given treatment in various hospitals.

8. Though there are attestors, their evidence was not believed since they neither knew the place at which the document was prepared, nor the name of the scribe. Therefore, the trial Judge held that there is sufficient suspicion surrounding the execution of the Will which excludes the other legal heirs particularly, in the light of the series of ailment and the supporting documents having been not produced by the defendants or by the plaintiff. Moreover, the very capacity of the father to execute the said Will by treating the properties as self-acquired properties was also taken as a ground to deny the veracity of the Will.

9. The trial Judge further held that D.W.2 is the mother who is old and illiterate. The document executed by her was influenced by the third defendant and her husband, who actively participated in the execution. Second defendant was also present in the Registration Office at the time of execution of the settlement deed. The third defendant actively participated in the execution of said document in favour of the second defendant and sixth defendant. The original Will and the settlement deed were also not produced. Accordingly, the learned trial Judge decreed the suit.

10. The point for consideration in this appeal is as to whether the appeal deserves to be allowed or not particularly in the light of the issues framed.

11. The learned counsel appearing for the appellants submitted that the onus is on the plaintiff to show that the suit properties, which have been purchased in the name of the mother and the defendants, are the joint family properties. The attestors have been examined to show the due execution of the Will and the settlement deed. Non-production of the original copy of the Will executed by the father and the settlement deed executed by the mother cannot be put against them. All the documents have been registered. A mere execution of Will in favour of some of the family members cannot be a factor to doubt it. The learned trial Judge has not considered the relevant materials. The evidence of D.W.2 has not been seen in toto. Thus, the appeal will have to be allowed.

12. The learned counsel appearing for the first respondent/plaintiff submitted that the trial Court considered all the materials while granting the decree. The first respondent was working in Malaysia. Taking advantage of his absence, others have tried to grab the joint family properties to his exclusion. Even, as per the evidence of D.W.2, there was sufficient nucleus. The father was not earning sufficiently while in Malaysia. There is always a presumption towards the jointness. The presumption regarding the property being individual has been dispelled by the first respondent adducing sufficient evidence. Therefore, the appeal will have to be dismissed.

13. The learned trial Judge has rightly placed reliance upon the evidence of D.W.2, being the first defendant, who is the mother of the plaintiff and some of the other defendants/appellants. She has clearly deposed, which has been recorded by the learned trial Judge, that her husband was not having sufficient income while he was working in Malaysia. That is the reason why he came from Malaysia. Even, when he went for

the second time also, he was working as a Supervisor. As stated, the evidence of D.W.2 is clearly to the effect that the deceased father was not earning sufficiently at Malaysia. She has clearly deposed that there was sufficient income derived from the ancestral properties. It is this evidence which found favoured with the learned trial Judge. Admittedly, she was an illiterate lady and housewife. There is no evidence to show that she was having means to buy the properties in her name.

14. Insofar as the reliance made on Exs.B1 to B9 is concerned, the learned trial Judge has given the correct finding that they have been purchased in between the years 1975 - 1982. The amounts mentioned thereunder were very meagre. In fact, the plaintiff has also sent money to the mother as was done by the second defendant. This, at best, a case of contribution by the male members and putting them in the joint family hotchpotch and thus the properties are joint family properties.

15. Insofar as the issue pertaining to execution of Will and the settlement deed is concerned, the evidence rendered by the attestors was correctly not accepted by the trial Judge. The originals have not been produced for the reasons best known. In the memo filed, no reason has been assigned to the effect that the first appellant was not in possession of the Will executed by the father. Such a stand has been taken only subsequently. The learned trial Judge rightly placing reliance upon the documents executed under Exs.A11,A15 to A19 held that the deceased father was not in a sound and disposing state of mind. He was having constant ailment which are very serious in nature. This was also admitted by D.W.3 in his evidence. Furthermore, since the properties are not self-acquired properties of the deceased father, he consciously would not have given it in favour of few of his children to the exclusion of the plaintiff and the 6th defendant. The evidence also would show that the father had executed settlement deed in favour of the second defendant and sixth defendant. There was an active participation of the third defendant. D.W.3 has married the daughter of the third defendant. Both D.W.3 and the second defendant also participated in the execution of the settlement deed. The mother was admittedly an illiterate old lady. The second defendant accompanied the mother, namely, the first defendant to the Registrar Office. These factors were rightly taken note of by the learned trial Judge. In fact, the mother has given evidence in tune with the case of the second defendant without even sufficient pleadings available in her written statement. This creates an impression that she was under the complete control of the defendants excluding the sixth defendant.

16. Thus, we find that the issues have been rightly answered by the learned trial Judge. As we do not find any reason to

interfere with the same, the appeal stands dismissed. No costs. Consequently, connected M.P.No.1 of 2012 is closed.

17. The memo filed by the learned counsel appearing on behalf of the appellants has been recorded insofar as the death of the first appellant is concerned. The learned trial Judge is directed to alter the shares of the parties pursuant to the death of the first appellant by passing another preliminary decree during the final hearing proceedings.

Sd/-

Assistant Registrar(CCC)

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Sub Assistant Registrar

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To

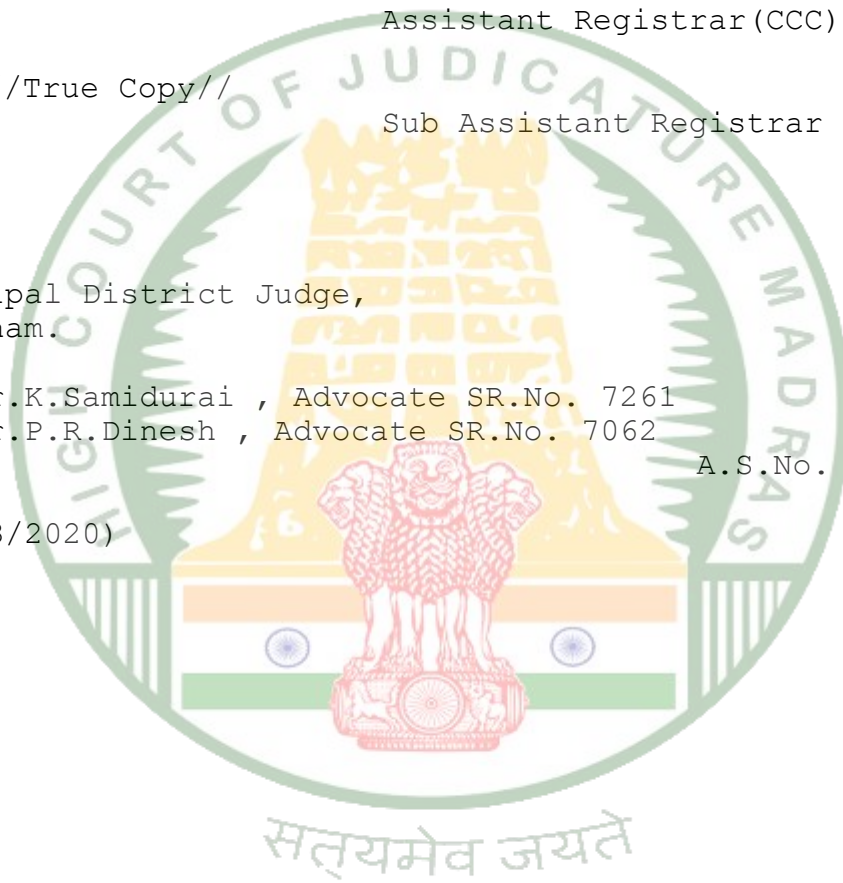
The Principal District Judge,
Nagapattinam.

+1cc to Mr.K.Samidurai , Advocate SR.No. 7261

+1cc to Mr.P.R.Dinesh , Advocate SR.No. 7062

A.S.No. 785 of 2012

A.SK(24/03/2020)



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