

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.09.2020

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.452 of 2020

and

C.M.P.No.9636 of 2020

1.A.Ranganathan

2.R.Arul

... Appellants/Appellants/
Defendants 1 & 2

Vs.

1.A.Kesavan

2.K.Panneer @ Kannan

3.K.Jeyabal

... respondents 1 to 3/Respondents
1 to 3 / Plaintiffs

4.R.Vijayakumar

5.Pavunambal

...4th & 5th Respondent/4th & 5th
Respondents / defendants 3 & 4

Prayer: The Second Appeal is filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree of the Subordinate Judge, Kallakurichi dated 10.12.2019 in A.S. No.51 of 2016 confirming the judgment and decree of the Trial Court of District Munsif Judge, Sankarapuram, dated 30.10.2015 made in O.S. No.586 of 2009.

For Appellants : Mr.R.Malaichamy

J U D G M E N T

The defendants in O.S.No.1431 of 2004 which is a suit for declaration of title or in the alternative for partition and separate possession of suit A and B schedule properties, having suffered a decree concurrently before the Courts below, have come up with this second appeal.

2. The suit in O.S.No.1431 of 2004 was laid by the plaintiffs claiming that the properties originally belonged to their maternal uncle Mannangatti Chettiyar who died issue less and his wife predeceased him. It is also contended that Mannangatti Chettiyar by Will dated 25.06.1992 had bequeathed certain properties to the plaintiffs 2 and 3 and the defendants 2 and 3 as well as his brother in law one Palani Chetty. The properties that were bequeathed to the plaintiffs 2 and 3 was shown as A schedule in the Will, while the properties bequeathed

to the defendants and Palani Chetty were shown as B and C Schedule respectively. The plaintiffs became the owners of the Suit A Schedule properties and since Mannangatti Chettiyar died intestate with reference to the B Schedule property, the B Schedule property devolved on the 1st plaintiff and the 1st defendant, they being the children of sister and Class II heirs of Mannangatti Chettiyar. Hence they would be entitled to $\frac{1}{2}$ share each in the suit properties. The plaintiffs also claimed that the defendants are claiming under an alleged Will said to have been executed by Mannangatti Chettiyar on 31.05.2002 and the same is invalid.

3. The defendants resisted the suit contending that Mannangatti Chettiyar had sold certain properties under the Sale Deed dated 09.11.2000 and he has also executed a Will dated 31.05.2002 bequeathing the properties to the 1st defendant and therefore the plaintiffs are not entitled to any share. It is also claimed that the Will dated 25.06.1992 stands cancelled, in view of the execution of the Will dated 31.05.2002. An additional written statement was also filed raising a plea that Palani, brother in law of Mannangatti Chettiyar is a necessary party to the suit.

4. At trial, the 1st plaintiff was examined as PW1 and one Balaraman was examined as PW2. While the 2nd defendant was examined as DW1 and one Krishnamurthy was examined as DW2. Exs A1 to A3 were marked on the side of the plaintiffs and Exs.B1 to B6 were marked on the side of the defendants. The Opinion of the Finger printer Expert was marked as Ex.C1.

5. The trial Court upon a consideration of the evidence on record concluded that the execution of the Will dated 25.06.1992 has been proved by the plaintiffs. It is also concluded that the defendants have not proved the execution of the two Wills produced by them, namely, Ex.B2 dated 09.11.2000 and Ex.B4 dated 31.05.2002. The learned trial Judge also upheld Ex.B1 sale deed dated 09.11.2000. On the said findings, the learned trial Judge dismissed the suit in respect of item Nos.1 and 2 in A Schedule and 14th item in B Schedule. The 3rd item in the A Schedule was declared as the property of plaintiffs 2 and 3 as per the Will dated 25.06.1992. A decree for possession of the said item in favour of the plaintiffs 2 and 3 was granted. As regards B Schedule, since the Wills produced by the defendants were disbelieved, the learned trial Judge granted a decree for partition of $\frac{1}{3}$ rd share in favour of the 1st plaintiff except in item number 14 of B Schedule. Aggrieved the defendants preferred an appeal in A.S.No.51 of 2016.

6. The learned Subordinate Judge, Kallakurichi who heard the appeal, on a re-appreciation of the evidence, concurred with the

findings of the trial Court and upheld the Judgment and decree. Hence, this Second appeal.

7. I have heard Mr.R.Malaichamy, learned counsel appearing for the appellants.

8. Mr.R.Malaichamy, learned counsel appearing for the appellants would vehemently contend that the Courts below were not right in disbelieving the Wills dated 09.11.2000 and 31.05.2002 marked as Exs.B2 and B4. According to him, since the Wills have not been denied, the Courts below were not right in disbelieving the Wills on the ground that the attestors have not been examined. The learned counsel would also draw my attention to Ex.C1 which is a report by the Expert on the Thumb impressions found in the said documents.

9. I have considered the submissions of the learned counsel for the appellants.

10. The submissions of the learned counsel for the appellants overlooks the statutory requirements under Sections 68, 69 and 71 of the Evidence Act. Factually, the plaintiffs have disputed the execution of the Will, dated 31.05.2002. It is also seen from the written statement that there is no reference to the Will dated 09.11.2000 in the said written statement. The defendants who rely upon these two Wills, have not examined the attestors to the documents, in order to prove the said document as required under Section 68 of the Evidence Act. It is not the case of the defendants that the attestors are not available. It is only pleaded that since execution of the document dated 09.11.2000 is not denied and the document is a registered instrument, the attestors need not be examined. I am unable to concur with the learned counsel in his submission.

11. The law regarding to proof of Wills is very clear. Whether the Will is admitted or disputed, if a party wants to take a legacy under the Will, he has to prove the Will in terms of Sections 68 or 69 or 71 of the Evidence Act. In the absence of the such evidence, the Court cannot give credence to the Will and uphold the Will. In the case on hand, the defendants have not chosen to examine the attestors of both the Wills relied upon by them. On the other hand, the Will dated 25.06.1992 has been proved in accordance with law by the plaintiffs. The properties sold under Exs.B1, B3 and other Sale Deeds said to have been executed by Mannangatti Chettiyar have been excluded by the Courts below and the suit has been decreed only in respect of the other properties. I therefore see no perversity in the findings of the Courts below in order to interfere with the concurrent findings or facts. I do not see any question of law, much less a substantial question of law, in order to enable

me to entertain the second appeal. The appeal therefore fails and it is accordingly dismissed without being admitted. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar

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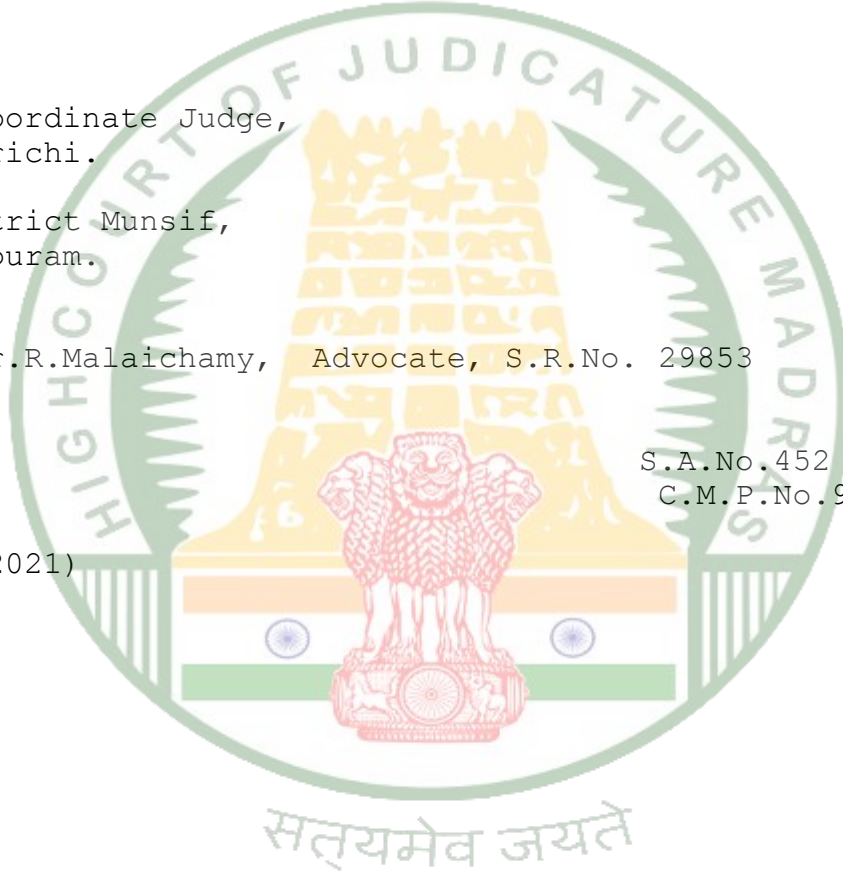
1.The Subordinate Judge,
Kallakurichi.

2.The District Munsif,
Sankarapuram.

+lcc to Mr.R.Malaichamy, Advocate, S.R.No. 29853

S.A.No.452 of 2020 and
C.M.P.No.9636 of 2020

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