

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30.01.2020

CORAM:

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

S.A.Nos.224 & 993 of 2014

Pappathi .. Appellant in S.A.No.224 of 2014 &
Respondent in S.A.No.993 of 2014

Versus

Manickam Gounder .. Respondent in S.A.No.224 of 2014 &
Appellant in S.A.No.993 of 2014

Second Appeals filed under Section 100 of Civil Procedure Code against the Judgment and Decree of the II Additional District Judge, Salem in A.S.No.44 of 2011, dated 26.04.2013 reversing / modifying the Judgment and Decree of the Principal Subordinate Judge, Salem in O.S.No.713 of 2003, dated 06.12.2007.

For Appellant in S.A.No.224 of 2014 &
Respondent in S.A.No.993 of 2014

: Mr.S.Kaithamalai Kumaran

For Respondent in S.A.No.224 of 2014 &
Appellant in S.A.No.993 of 2014

: Ms.Zeenath Begum

C O M M O N J U D G M E N T

The Suit in O.S.No.713 of 2003 was filed by one Pappathi, for partition and separate possession and for costs. The case of the plaintiff in brief is that she and the defendant are the children of Velu Gounder, who died on 05.06.1999. The suit schedule properties are the joint family properties of the said Velu Gounder and during his life time, he executed a registered Will dated 04.04.1995, bequeathing his properties in favour of the plaintiff. It is claimed that she is in joint possession and enjoyment of her share in the suit properties. Since a

dispute arose between the plaintiff and the defendant in the manner of enjoyment over the suit properties, she issued a legal notice dated 27.04.2002 to the defendant demanding for partition of the suit properties into 2 equal shares and allotment of one such share to the plaintiff, but there was no proper response from the defendant. Hence, the suit.

2. The suit was resisted by the defendant, contending that the plaintiff is the daughter of one Pappayammal, the first divorced wife of Velu Gounder. It is stated that the said Pappayammal within the year or so after the marriage, left the matrimonial home and delivered the plaintiff and never returned back to her husband subsequently. It is further stated that the plaintiff and her mother Pappayammal instituted the suit in O.S.No.108 of 1955 on the file of District Munsif Court Salem for maintenance and got a Decree and tried to arrest the Velu Gounder for recover the maintenance amount. At that time, one Sadaya Gounder, younger brother of Velu Gounder voluntarily came forward to settle the claim of maintenance and marriage expenditure under valid release deed, dated 04.12.1956 by paying cash consideration. Ever since the date of release, there was no relationship as daughter and father.

3. It is further stated that thereafter Velu Gounder married Rajammal, the defendant was born through the second wife of Velu Gounder. According to the defendant, the suit properties are not the joint family properties and the Will is not genuine and it was not executed by Velu Gounder. It is further stated that the suit properties belonged to one Kandayammal, who is none other than the sister of Rajammal, and sister-in-law of Velu Gounder, and out of love and affection, she parted with half share in the said properties in favour of Rajammal and the defendant, by way of partition, dated 17.11.1972. In the said partition deed, Velu Gounder was shown only as a formal party and there is no evidence to show that there are joint family properties at the time of execution of partition deed and therefore, he has no right to execute the Will in favour of the plaintiff. It is also stated that at the time of execution of the Will, the said Velu Gounder was not in a sound state of mind and it is forged.

4. On the basis of the above pleadings, the trial Court framed necessary issues. On behalf of the plaintiff, two witnesses were examined as P.W.1 and P.W.2 and Exs.A1 to A4 were marked. On the side of the defendant, D.W.1 was examined and Exs.B1 to B6 were produced. After considering the evidence adduced by the parties, the trial Court decreed the suit. Aggrieved over the same, the defendant preferred the Appeal in A.S.No.44 of 2011 before II Additional District Judge, Salem. The appellate Court, modified the Judgment and Decree of the

trial Court. Challenging the same, the present appeals S.A.No.224 of 2014 and S.A.No.993 of 2014 have been filed by the plaintiff and defendant respectively.

5. Mr.S.Kaithamalai Kumaran, learned counsel appearing on behalf of the appellant would urge that the Judgment and Decree of the lower appellate Court in reversing the well considered Judgment and Decree of the trial Court are contrary to law and legally unsustainable. It is the submission of the learned counsel that the suit properties are the joint family properties of Velu Gounder and under Ex.B2-partition deed, dated 17.11.1972, a partition between Velu Gounder and his brother Sadaya Gounder took place. Though the trial Court held that as per the Will, dated 04.04.1995, the plaintiff is entitled to half share in the suit properties, the appellate Court erred in holding that the plaintiff / appellant is entitled to only 1/4th share in the suit properties, which is legally unsustainable.

6. Mr.Zeenath Begum, learned counsel for the respondent / defendant would submit that the suit schedule properties are the self acquired properties of Kandayammal and not the joint family properties of Velu Gounder and no evidence was produced to establish that the family of Velu Gounder possessed the suit properties. It is further contended that Velu Gounder has not been given the power of alienation under Ex.B2 and his right is restricted and he has not authority to execute the Will in favour of the plaintiff.

7. Heard the rival submissions and perused the materials available on record.

8. In the case on hand, the suit in O.S.No.713 of 2003 was filed claiming half share in the suit properties. The case of the plaintiff is that she is the daughter and the first defendant is the son of Velu Gounder. It is her further case that the suit properties are joint family properties of Velu Gounder and he executed a registered Will, dated 04.04.1995, bequeathing his properties in favour of the plaintiff. The testator Velu Gounder died on 05.06.1999 and after his demise, the Will came into force. But the defendant did not come forward to effect partition of the suit properties.

9. The suit was resisted by the defendant contending that the plaintiff was born to Velu Gounder through his first wife Pappayammal and she deserted the family in a short period. It is further contended that the plaintiff's mother along with the plaintiff filed the suit in O.S.No.108 of 1955, claiming maintenance and based on the Decree, they attempted to arrest the Velu Gounder. At that juncture, the brother of Velu Gounder,

viz., Sadaya Gounder interfered and the plaintiff and her mother were paid Rs.1,200/- towards maintenance and the marriage expenses of the plaintiff and they relinquished their right for future maintenance and all other claims. It is also contended that the suit schedule properties belonging to Kandayammal and in the partition deed, dated 17.11.1972, the plaintiff's father Velu Gounder was not given any independent right of alienation of the 'A' schedule property and he was shown only as formal party and he has no authority to execute the Will.

10. In order to prove the case of the plaintiff, the Will was marked as Ex.A2. The attester of the Will, gave evidence as P.W.2, wherein he supported the case of the plaintiff. It is not the case of the defendant Ex.A2-Will was forged by the plaintiff and on the other hand, the defense was that the father of the plaintiff Velu Gounder has no right to execute the Will. The release deed was marked as Ex.B1 and Ex.B2 is the partition deed, dated 17.11.1972. Though it was contended by the defendant that the suit properties belonging to Kandayammal by virtue of a sale deed, dated 20.04.1968, but, admittedly, the sale deed was not produced. The recitals in Ex.B2 show that the properties purchased in the name of Kandayammal and the ancestral properties of the plaintiff were put into common hotch pot and treated as joint family properties. Further, admittedly, no details have been given in Ex.B2 with regard to the property of Kandayammal and the ancestral properties.

11. It is further seen that under Ex.B2-partition deed, 'A' schedule property was allotted to Velu Gounder, his wife, Rajammal and their legal-heirs. 'B' schedule property was allotted to Sadaya Gounder, Kandayammal and their legal-heirs. This suit relates to 'A' schedule property and there is no dispute with regard to 'B' schedule property. From the evidence of P.W.1 and P.W.2 and Ex.A2, both the Courts came to the conclusion that the executor had right to execute Ex.A2-Will and the execution of the Will was proved. It is pertinent to note that under Ex.A2, the testator Velu Gounder had bequeathed the entire suit properties in favour of the plaintiff, but the plaintiff claims only half share therefrom treating them as joint family properties.

12. The trial Court, taking note of the fact that the father of the plaintiff has a right to execute the Will in respect of a share over the property, held that the plaintiff is entitled for half share in the suit properties. The appellate Court having found that father of the plaintiff is entitled to half share and the remaining half share belongs to his mother Rajammal, however granted preliminary Decree, allotting 1/4 share to the plaintiff. It is appropriate to note that the appellate Court

having held that execution of Ex.A2 is proved and the testator has right to execute Ex.A2 in respect of his share, was not right in granting half share in the share of the plaintiff's father. In other words, if the Will is found to be proved and valid, the plaintiff is entitled for half share in the suit properties.

13. The trial Court, after considering the relevant evidence, has rightly held that the plaintiff is entitled for half share, but the first appellate Court without assigning any reason, reduced the share to 1/4. For the reasons stated above, the Judgment and Decree of the appellate Court is hereby set-aside and the Judgment and Decree of the trial Court is restored.

14. In fine, the Second Appeal No.224 of 2014 is allowed and the Second Appeal No.993 of 2014 is dismissed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The II Additional District Judge,
Salem.
2. The Principal Subordinate Judge,
Salem.

Copy to

The Section Officer,
VR Section, High Court,
Madras-104.

+1cc to Mr.S.Kaithamalai Kumaran, Advocate Sr.7109
+1cc to M/s.Zeenath Begum, Advocate Sr.7165

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cmr[co]
srg 18/08/2020