



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.03.2021

PRONOUNCED ON : 09.03.2021

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CORAM:

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

A.S.No.936 of 2009

M.Premkumari,

...Appellant/Plaintiff

/versus/

1. A.Krishnaraj,
2. R.Prabavathy,
3. R.Dicto,
4. R.Senthil,
5. R.Vijayalakshmi,

...Respondents/Defendants

Prayer: First Appeal is filed under Section 96 read with Order 41 Rule 1 of C.P.C., against the decree and Judgment passed in O.S.No.839 of 2004, dated 26.12.2008 on the file of the Additional District and Sessions Judge, Coimbatore, (Fast Track Court No.II, Coimbatore).

For Appellant : Mr.V.Kannan

For R1,R3 toR5 : Mr.Arvinth Pandian,
Senior Counsel
for Mr.M.Roshan Afiq

For R2 : No appearance

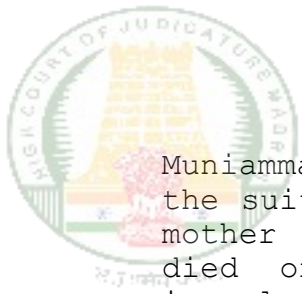
J U D G M E N T

The Appellant herein is the plaintiff in the suit before the Trial Court. The Appeal is directed against the dismissal of the suit filed for partition.

2. Case of the plaintiff:-

Anganna Chettiar and Muniammal had two daughters and two sons. One daughter died unmarried issueless. One son predeceased his parents leaving behind his wife and children. The plaintiff is their sole surviving daughter and the first defendant is their sole surviving son. The defendant Nos.2 to 5 are the legal heirs of their predeceased son.

3. The property in Item No.1 of the suit property belongs to



Muniammal inherited from her father Velliangiri. Item No.2 of the suit property belongs to Anganna Chettiar inherited from his mother Desakkal. Anganna Chettiar died on 05.06.1964. Muniammal died on 03.10.2004. One of their daughter Sulochana died issueless on 14.09.1997. Muniammal had a sister by name Visalakshiammal, who also died issueless on 21.10.2003. The suit properties item Nos.1 and 2 are jointly enjoyed by the two sons and one daughter of Anganna Chettiar and Muniammal. When the plaintiff sought for partition, the defendants refused to give share. Hence, suit for partition seeking 1/3rd share in the property of her parents.

4. Case of the defendants:-

The relationship admitted. The fact that item No.1 property belongs to Muniammal and item No.2 property belongs to Anganna Chettiar is not wholly correct. They both had only limited interest till their life over the properties. Velliangiri Chettiar the father of Muniammal executed a settlement deed dated 06.07.1949 registered as document No.2531/49, wherein, the limited right of enjoyment till life without right of alienation was given to his two daughters. Muniammal and Visalakshiammal, after their lifetime to vest absolutely with two sons of Muniammal. Accordingly, after the lifetime of Muniammal and Visalakshiammal, the defendants had become the absolute owner of the item No.1 of the suit property and enjoying it without any obstruction. Likewise, the item No.2 property, belongs to Desammal and she executed a will dated 05.12.1937 got registered on 05.12.1937 bequeathing the property to the grand sons Krishnaraj and Ramalingam born to her son Anganna Chettiar. She gave only right of enjoyment till life to her son Anganna Chettiar. On the death of Desammal, the will came into force and acted upon. Anganna chettiar till his life time was enjoying the property and on his death, the defendant became the absolute owners of the said property.

5. After the death of their mother Muniammal, during the year 2004 the plaintiff tried to cause disturbance to their peaceful possession. The defendants gave police complaint and restored peace. The plaintiff live in Chennai. As a sister she was allowed to stay in the suit property when she visit. The plaintiff never been in possession or enjoyment of the suit property.

6. In the rejoinder, the plaintiff denied the validity of the settlement deed and the will referred in the written statement. Her contention was that those documents were never acted upon. She was in possession of the first item property before and after the death of her mother Muniammal. After filing the suit, the first defendant gave police complaint and forced her to vacate the suit property. She got married in the year 1976 and living with her family at Chennai. She used to stayed



at the suit property often.

7. The 1st defendant filed additional written statement admitting that, the plaintiff used to stay in the suit property not as sharer, but as his sister. Thus, with these pleadings, the following issues were framed and matter went for trial.

1. Whether the settlement deed executed by Velliangiri in respect of item No.1 and the will executed by Desammal in respect of item No.II of the suit properties are true, legal and valid?

2. Whether the 1st defendant and his brother deceased Ramalingam are entitled to the suit properties on the strength of the settlement deed and the Will?

3. Whether the plaintiff has no right to claim any share in the suit properties?

4. Whether the plaintiff is entitled to the relief of partition of her share in the suit properties and claim in the plaint?

5. Whether the suit property valued with proper Court Fees and paid?

6. Whether the plaintiff is entitled to the relief of the permanent injunction as sought for in the plaint?

7. To what other relief the plaintiff is entitled to get?

8. Before the Trial Court, the plaintiff was examined as P.W-1. The death certificate of Muniammal and death certificate of Vishalakshiammal were marked as Ex.A-1 and Ex.A-2. On the side of the defendants, 6 witnesses and 32 Exhibits were marked. The report of the finger print expert was marked as Ex.X-1.

9. The Trial Court held that the defendants have proved the due execution of the settlement deed Ex.B-1 dated 06.07.1949 and the will Ex.B-5 dated 05.12.1937 and the same acted upon. Therefore, held that the plaintiff is not entitled for the relief of partition and separate possession in the suit property and dismissed the suit. Hence, the present appeal.

10. The Learned Counsel for the appellant filed his written arguments besides placing his submission why the Trial Court judgement should be interfered. According to the Appellant, the respondents failed to prove the genuineness of Ex.B-1 the settlement deed as well as Ex.B-5 the will beyond reasonable doubt. These two documents are not the original but the certified copy. The whereabouts of the original not explained. The factual foundation in respect of the loss of original



documents not proved. The Trial Court failed to note the respondents not followed the requirements laid under law, before introducing the secondary evidence and the same was admitted in evidence contrary to law by erroneously treating it as 30 years old documents. The Trial Court erred in relying upon a stray admission made in the cross examination in a confused state of mind. The Trial Court has ignored to consider the rule of law regarding the interpretation of the Will and settlement. It erred in side lining the binding precedents on the subject which resulted in grave prejudice to the appellant.

11. The following judgments were cited by the Appellant Counsel to buttress his submissions:-

(i). Benga Behera and others -vs- Braja Kishore Nanda and others reported in 2008 (1) L.W. 241.

(ii). M.B.Ramesh (dead) by LRs -vs- K.M.Veerajurs (dead) by LRs and others reported in (2013) 7 SCC 490.

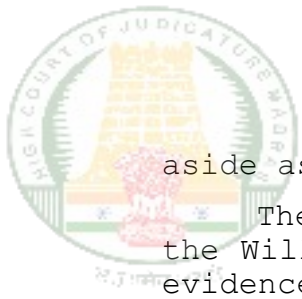
(iii). H.Siddiqui (dead) by LRs -vs- A.Ramalingam reported in (2011) 4 MLJ 887 (SC).

(iv). Daulat Ram and others -vs- Sodha and others reported in 2004(5) CTC 790 (SC).

(v). Hari Steel and General Industries Ltd and another -vs- Daljit Singh and others reported in 2019 (4) MLJ 100 SC.

(vi). Raveesh Chand Jain -vs- Raj Rani Jain reported in (2015) 8 SCC 428.

12. Per contra, the Learned Senior Counsel for the respondents submitted that, the suit properties are the absolute properties of the respondents which they got through a registered Will of the year 1937 and a registered settlement deed of the year 1949. The suit was filed by the appellant in the year 2004 suppressing the existence of these two instruments. The certified copy of these two documents were marked by the respondents as Ex.B-1 and Ex.B-5. The settlement and the Will were given effect and acted upon by the parties concern is established through the mortgage deeds Ex.B-2, Ex.B-8 to Ex.B-13. Merely because, the Will dated 05.12.1937 was registered on 05.12.1937 after 10 days does not make it a suspicious document. The respondents have proved through expert that the thumb impression of Desammal found in the admitted document namely Ex.B-8, the original mortgage deed of the year 1916 compared with the thumb impression in the register maintained by the Sub-Registrar Office while registering the Will Ex.B-5 were found tallied. The opinion of the finger print expert marked as Ex.X-1 proves beyond doubt that the Will Ex.B-5 of Dasammal is true and genuine. The admission of the appellant during the cross examination about the execution of Will by Dasammal and settlement deed by Velliangiri cannot be brushed



aside as stray admission.

The point for consideration arising in this appeal:- Whether the Will Ex.B-5 and the settlement deed Ex.B-1 being a secondary evidence, proved in the manner known to law ?

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13. The plaintiff specific case in the plaint was that her mother Muniammal got the item No.1 property from maternal grandfather Velliangiri. Whereas, the case of the defendant is that, only enjoyment till life was given to Muniammal and her sister Visalakshiammal. The absolute right was vested to sons of Muniammal i.e., Krishnaraj and Ramalingam as per the registered settlement deed Ex.B-1. Similarly, the case of the plaintiff regarding item No.2 property, is that, it is the property of her father Anganna Chettiar, which he got from his mother Desammal. On the death of Anganna Chettiar, she as a daughter has a share in that property. Whereas, the case of the defendant is that, Anganna Chettiar had only life interest in the said property. The absolute interest vested with the defendants.

14. The point to be addressed is whether Ex.B.1 & Ex.B.5 are genuine, valid and acted up by the parties. For the said purpose, it is necessary to look whether the defendants, who rely upon Ex.B.1 & Ex.B.5 to divest the right of the plaintiff had proved those two documents. Both these two exhibits are certified copy of the registered document. The original is 30 years old but not produced before the Court. The whereabouts of the original settlement deed Ex.B.1 dated 06.07.1949 and original Will Ex.B.5 dated 05.12.1937 not sufficiently explained by the defendants. In the deposition of D.W.1, he has stated that the plaintiff had taken away the original, when she visited her mother.

15. It is contended by the Learned Counsel for the appellant that the defendants had not properly accounted for not producing the original. They have not adduced the foundational evidence before introducing the secondary evidence.

16. Referring Section 68 of Indian Evidence Act, the Learned Counsel would submit that both the settlement deed (Ex.B.1) as well as Will Ex.B.5 are documents required by law to be attested since it involves Transfer of Immovable property and even if it is a registered document the proviso to Section 68 mandates in case of Will, the attesting witness has to be called to prove the execution of the Will and sound disposition of mind of the executor.

17. In this case, Ex.B.5 which is Will alleged to have been executed by Dasammal not been proved through attesting witness regarding her sound disposition state of mind. Therefore, the Learned Counsel pleaded that the trial Court ought to have eschewed these two documents for non-compliance of the mandatory



requirement as envisaged under the evidence Act.

18. Section 68 of Evidence Act is subjected to Sections 69, 70 & 71. The Will Ex.B.5 is a document of the year 1937 and it may not be fair to expect the attesting witnesses to the will be alive. Therefore, the execution of the said document though registered but being a Will, under the proviso to Section 68 it has to be proved in the manner known to law, either by examining any one of the attesting witness or through a person conversant with the signature of the attesting witness.

19. In this case, the finger print of Desammal found in the register maintained in the Sub Registrar Office when Will Ex.B.5 got registered has been compared with admitted signature. The finger print expert had given his opinion that they tallied. It is nobody case that Desammal was not in good state of mind while executing the Will. Further, the plaintiff herself had admitted in her cross examination that she know Desammal executed a Will in the year 1937 in respect of item No.2 property and in the said Will while life interest was given to her father Anganna Chettiar and he had no right to alienate. The Will has been attested by one Govindaraj Son of Ramasamy and one Thottae Goundar. The defendant had examined D.W.3 & D.W.4 to identify the signatures of attesting witness found in the Will. D.W.3 Jayabal Son of Thottae Goundar, is the one of the attesting witness to the Will of Desammal. He has mounted the witness box and identified the signature of his father and also produced a sale deed in his name. To prove that, he is the son of Thottae Goundar. He had deposed that his father Thottae Goundar died in the year 1986. Defendants have examined V.Rajagopal and his maternal grandfather K.C.Ramasamy Naidu, who is another witness to the Will. He has produced the gift deed by his grandfather Ramasamy Naidu in favour of his mother Rajamaniammal. This gift deed is of the year 1939. The signature of Ramasamy Naidu found in that document is marked as Ex.B.29. The finger print experts opinion is marked as Ex.X.1. The left thumb impression of Desammal found in the Will and left thumb impression of Desammal found in the register kept in Sub Registrar Office were compared and found to be identical and the report with reasoning is found in Ex.X.1.

20. The Law does not totally prohibit introduction of Secondary evidence but expect that before adducing secondary evidence, there must be foundational evidence to admit secondary evidence.

21. In this case, the factum that the document Ex.B.1 & Ex.B.5 were registered documents came into existence more than 60 years before the institution of the suit cannot be ignored. Further, the foundation evidence has been let in by the



defendants that during the plaintiff visit to their house, she had takeaway the original. It is true that such a plea not stated in the written statement at the first instant. But it cannot be a reason to discard the other evidence placed by the defendants to prove the execution of Ex.B.1 & Ex.B.5 and also further more the same was acted upon by creating mortgages, mutation of records, house tax register, electricity Board and water connections.

22. In this regard, it is sufficient to refer the judgment of Hon'ble Punjab and Harayana High Court following the Hon'ble Supreme Court rendered in U.Sree -vs- Srinivas reported in 2013 (2) SCC 114, the learned Judge with all erudition had explained what is the foundational evidence required before adducing secondary evidence and how such secondary evidence to be admitted and appreciated.

"In U. Sree Vs. U. Srinivas (2013) 2 SCC 114 referred to above the Supreme Court was referring to the foundation that would require to be laid before secondary evidence is taken as admissible. In the absence of foundation evidence as required under Section 65 of the Evidence Act, the Court said that it will be inadmissible. The Court however observed that even a mere admission of a document in evidence would not amount to its proof. Therefore, it is the obligation of the Court to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. There is no requirement to even file a petition for reception of secondary evidence. It is an essential rule of evidence that a justification which a person sets out at the time when the document is sought to be exhibited as evidence is tendered in the chief examination."

23. In M. Chandra vs. M.Thangamuthu and Other reported in (2010) 9 SCC 712, it has been held as follows:-

"It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The



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secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party."

24. Going by the test laid by the Hon'ble Supreme Court, this Court is satisfied that the trial Court had rightly admitted the secondary evidence i.e., Settlement Deed (Ex.B.1) and Will (Ex.B.5). Having found there is a foundational evidence for accepting the secondary evidence. In fact, the defendants through adducing evidence by calling the records from the Sub Registrar Office and by examining the persons, who are conversant with the signature of the attesting witness to the best of their capacity had proved, the due execution of Ex.B.1 & Ex.B.5 and also proved, in consequence of Ex.B.1 and Ex.B.5, the parties have acted upon and enjoying the property uninterruptedly. The attempt of the plaintiff/appellant to get 1/3rd share in the suit property by suppressing the fact that, neither in view of Ex.B.1 and Ex.B.5 the father nor mother had any right over the property after their lifetime for their descendent to inherit. From the evidence the defendants have proved to the Court that they are absolute owners of the suit property and none else have share in it. In the said circumstances, this Court has no hesitation to dismiss the Appeal and uphold the judgment and decree passed by the Trial Court. Accordingly, the Appeal Suit is dismissed. No costs.

Sd/-

Assistant Registrar(CS-II)

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Sub Assistant Registrar

bsm

To

1.The Additional District and Sessions Judge, Coimbatore,
Fast Track Court No.II, Coimbatore.

Copy To

The Section Officer,V.R.Section,High Court, Madras.

+1cc to Mr.V.Kannan, Advocate, S.R.No.12653

A.S.No.936 of 2009

SR(CO)

RGA(12/08/2021)