



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 22.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)Nos.1012 and 1038 of 2008

WEB COPY

In S.A. (MD)No.1012 of 2008

R.Kamala ... Appellant / 1st Respondent / 1st Defendant

-Vs-

1.M.Natarajan ... 1st Respondent / Appellant / Plaintiff

2.Tiruchirappalli City Corporation

Represented by its Zonal Officer,

Having office at

Srirengam,

Trichy-6.

... 2nd Respondent / 2nd Respondent /
2nd Defendant

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 30.12.2005 in A.S.No.59 of 2004 on the file of the Principal District Judge, Trichirappalli, reversing the judgment and decree dated 20.11.2003 in O.S.No.1273 of 1994 on the file of the Sub Court, Trichy.

For Appellant	: Mr.R.Vijayakumar for Mr. V.Sasikumar
For R1	: Mr.P.Vadivel
For R2	: Mr.J.Parek Kumar

In S.A. (MD)No.1038 of 2008

R.Kamala ...Appellant / 1st Respondent /
1st Defendant

-Vs-

1.M.Natarajan ...Respondent / Appellant / Plaintiff

2.D.Shanthi ...2nd Respondent / 2nd Respondent /
2nd Defendant

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 30.12.2005 in A.S.No.357 of 2005 on the file of the Principal District Judge, Trichirappalli, reversing the judgment and decree dated 20.11.2003 in O.S.No.646 of 1996 on the file of the Sub Court, Trichy.

For Appellant	: Mr.R.Vijayakumar
For R1	: Mr.P.Vadivel
For R2	: given up



COMMON JUDGMENT

These second appeals arise out of the common judgment rendered in O.S.No.646 of 1996 and O.S.No.1273 of 1994 instituted by the first respondent Thiru.M.Natarajan. The plaintiff Natarajan and the appellant Kamala are brother and sister. They were born to Manickam and Thailammai Ammal. Manickam's father Vairavan had an elder brother by name Karuppanna Muthiriar. The property that is the subject matter of O.S.No.646 of 1996 belonged to Karuppanna Muthiriar.

2.The case of Natarajan is that the said Karuppannan had executed a registered Will dated 21.07.1955 conferring life estate on his nephew Manickam and his wife Thailammai Ammal and absolute interest in his favour. There is no dispute that Manickam/father of the parties herein had dealt with the suit property on more than one occasion by mortgaging the same. Manickam passed away on 10.09.1994. According to Natarajan, he is also entitled to 50% share in the terminal benefits of Manickam. He therefore filed two suits namely O.S.No.646 of 1996 seeking the relief of declaration and recovery of possession in respect of the suit property and O.S.No.1273 of 1994 seeking 50% share in the terminal benefits of the father. The appellant Kamala filed written statement resisting the suit claims. Her stand was that the Will dated 21.07.1955 (Ex.A1) was cancelled by Karuppanna Muthiriar himself on 05.12.1956 (Ex.B1). She also stated that her father Manickam had executed a Will dated 30.05.1994 bequeathing his entire life estate in favour of the appellant. Based on the divergent pleadings, the trial Judge framed the following issues in O.S.No.646 of 1996:-

1.Whether the plaintiff is entitled to a decree for declaration?

2. Whether the Will dated 09.10.1955 has been cancelled by the Will dated 05.012.1956?

3. Whether the first defendant is entitled to the suit property by virtue of the Will dated 30.05.1994?.

4. Whether the plaintiff is entitled to mesne profits?

5. To what relief, the plaintiff entitled?

In O.S.No.1273 of 1994, the following issues have been framed:-

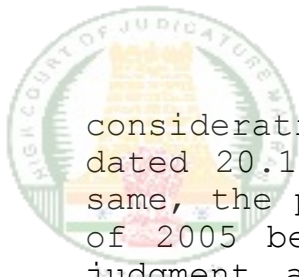
1.Whether the plaintiff is entitled to a share over the suit property ?

2. Whether the first defendant is entitled to full rights as per Will?

3. Whether the plaintiff is entitled to partition?

4.To what other relief is the plaintiff entitled?

3.The plaintiff examined himself as P.W.1 and marked Ex.A1 to Ex.A3. The appellant Kamala examined herself as D.W.1 and two other witnesses on her side. Ex.B1 to Ex.B12 were marked. After



consideration of the evidence on record, by judgment and decree dated 20.11.2003, both the suits were dismissed. Aggrieved by the same, the plaintiff Natarajan filed A.S.No.59 of 2004 and A.S.No.357 of 2005 before the Principal District Judge, Tiruchirappalli. By judgment and decree dated 30.12.2005, the decision of the trial Court was reversed. A.S.No.357 of 2005 was allowed in *toto*, while A.S.No.59 of 2004 was partly allowed granting 50% share in favour of the plaintiff in respect of his father's terminal benefits. Aggrieved by the same, these second appeals have been filed.

4.SA(MD)No.1012 of 2008 was admitted on 29.09.2008 on the following substantial question of law :

"Whether the lower appellate court has rightly held that though the appellant has proved the Ex.B12 Will by one attesting witness, the appellant is entitled to only half share of the retirement benefits?".

SA(MD)No.1038 of 2008 was admitted on 21.10.2008 on the following substantial questions of law :

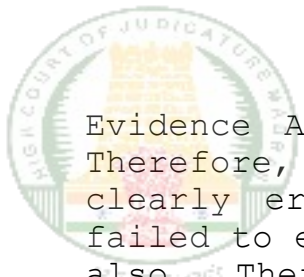
"1.Whether the conclusion of the lower appellate Court that the Will of the year 1955 has not been cancelled by the Will dated 05.12.1956, since Ex.B1 was not a genuine one merely because it was registered and executed through witnesses is correct?

2.Whether the lower appellate Court rightly held that when the execution of Ex.A1 was admitted by the plaintiff in plaint as on 09.10.1955 and the findings of the execution of A1 is contrary to the plaint is correct or not?

3.Whether the findings of the lower appellate Court that Ex.B2 is partly valid and partly not valid is correct under law?"

5.Heard the learned counsel on either side.

6.The learned counsel appearing for the appellant submitted that the first appellate court had held that Ex.B12 Will dated 30.05.1994 executed by Manickam had been proved by Kamala. The first appellate Court declined to give full effect to the same on the ground that Thiru.Manickam could not have bequeathed the suit property in O.S No.646 of 1996 in favour of his daughter. This was because, vide Ex.A1-Will dated 21.07.1955, Manickam was given only life estate. Therefore, there was nothing for him to bequeath. The learned counsel appearing for the appellant pointed out that Ex.A1 was erroneously held as proved by the first appellate Court. He attacked each and every reason set out in Paragraph No.16 of the impugned judgment passed by the first appellate court. The first appellate Court had invoked Section 90 of the Indian Evidence Act to hold that Ex.A1-will was genuine. He pointed out that the presumption available for ancient documents under Section 90 of the



Evidence Act could not have been invoked in the case of Wills. Therefore, the first reason set out by the first appellate Court was clearly erroneous. He also pointed out that the plaintiff had failed to examine the attestors. He had not filed the original Will also. Therefore, the first appellate Court ought to have held that Ex.A1 had not been proved. Once it is concluded that Ex.A1 has not been proved, the consequence is that the property will devolve on Manickam absolutely in his capacity as Class II Legal heir. Therefore, Manickam was clearly entitled to bequeath the same vide Ex.B12. He also pointed out that the suit property was mortgaged during the life time of Manickam and that it was redeemed only by the appellant. The appellant had also filed the proof therefor. Thus, the appellant had stepped into the shoes of the original mortgagee. Without redeeming the same, it is not open to the plaintiff to seek recovery of possession. He therefore submitted that the suit was clearly not maintainable in law.

7.Per contra, the learned counsel appearing for the first plaintiff Natarajan submitted that the impugned judgment passed by the first appellate Court does not call for any interference.

8.I carefully considered the rival contentions and went through the evidence on record. As rightly observed by the first appellate Court, Ex.B12 Will executed by Thiru.Manickam on 30.05.1994 in favour of his daughter Kamala had been proved by the appellant. The appellant had examined the attesting witness and also the scribe as D.W.2 and D.W.3. Trichy City Municipal Corporation that was also arrayed as defendant filed written statement mentioning that Manickam had named Kamala as her nominee in the service register. Therefore, I must sustain the finding of the first appellate Court that Ex.B12 Will had been proved by the appellant Kamala. I answer the substantial question of law formulated in SA(MD)No.1012 of 2008 in favour of the appellant. Kamala will be entitled to the terminal benefits of Manickam in full and the plaintiff Natarajan will not have any share therein. The judgment and decree passed by the first appellate court in AS No.59 of 2004 on the file of the Principal District Judge, Trichy is set aside. The decision of the trial court in O.S No.1273 of 1994 on the file of the Sub Court, Trichy is restored. If Natarajan had withdrawn any amount deposited by the Corporation / employer to the credit of the suit, the same will have to be returned to the appellant with interest at the rate of 9% per annum from the date of such withdrawal till the date of payment.

9.The next question that arises for consideration is whether vide Ex.B12 Will Manickam could have bequeathed the suit property in O.S.No.646 of 1996. The answer to this question will depend on proof of Ex.A1-Will said to have been executed by Karuppanna Muthiriar on 21.07.1955. It is true that the first appellate Court erred in invoking Section 90 of the Indian Evidence Act to confer presumption on genuineness of the said document. It is well settled



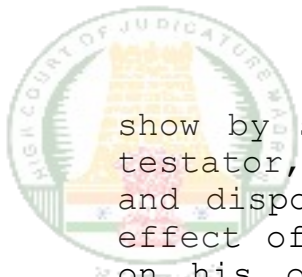
that Section 90 is not applicable in the case of Wills. It is equally true that the original Will was not filed. The stand of the plaintiff is that the original document is in the custody of the appellant and that she is withholding the same.

10. Be that as it may, the fact remains that the plaintiff had marked the certified copy of the said Will as Ex.A1. There is no dispute that Karuppanna Muthiriar is the grand-uncle of the parties herein. Will is dated 21.07.1955. Obviously, the attestors of the said document will not be alive. In any event, Natarajan had testified that the attestors are dead. It has not been established by the appellant that the attestors of Ex.A1 were alive, when the Will was sought to be admitted in evidence.

11. The learned counsel for the plaintiff Natarajan drew my attention to the decision reported in **(1972) 2 MLJ 508 (Irudayammal and others Vs. Salayath Mary)**, in which, the Division Bench of the Madras High Court held that in such cases, the Will can be proved by other acceptable, satisfactory evidence, supplemented by such presumptions as would arise under the provisions of the Registration Act and Section 114 of the Evidence Act. In this case, Ex.A1 was registered. Hence, the general presumption arising under Section 60 of the Indian Registration Act can be pressed into service. The Division Bench observed that while it is true that registration by itself in all cases is not proof of execution, but if no other evidence is available, the certificate of registration is prima facie evidence of its execution and the certificate of the registration officer is relevant for proving execution. In this case, apart from the fact that Ex.A1 is a registered document, in the mortgage transactions, to which, the father of the parties Thiru.Manickam is a party, there is a clear reference to Ex.A1. More than anything else, as rightly pointed out by the learned counsel appearing for the respondent herein, the appellant herself in her written statement had admitted the execution of Ex.A1. Of course, some confusion has been caused with regard to the date 09.10.1955. In fact, the Will was executed only on 21.07.1955. But the value of the property had been mentioned as Rs.910/-. That has been wrongly typed in the pleadings that the Will is dated 09.10.1955. On account of this confusion regarding dates, the trial Court chose to hold that Ex.A1 has not been proved. The first appellate Court correctly came to the conclusion that Ex.A1 had been fully proved by the plaintiff.

12. The learned counsel appearing for the appellant would draw my attention to the decision of the Hon'ble Supreme Court reported in **(2017) 1 SCC 257 (Ramesh Verma (dead) through legal representatives Vs. Lajesh Saxena)**. Paragraph No.13 of the said decision reads as follows:-

"13. A Will like any other document is to be proved in terms of the provisions of Section 68 of the Indian Succession Act and the Evidence Act. The propounder of the Will is called upon to



show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document on his own free will and the document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. This is the mandate of Section 68 of the Evidence Act and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement."

The aforesaid decision will not render the ratio laid down in **(1972) 2 MLJ 508 (Irudayammal and others Vs. Salayath Mary)** inapplicable to the facts of the present case. In Paragraph No.13, it has been held that the mandate of Section 68 of the Evidence Act will have to be complied with even where the opposite party does not specifically deny the execution of the document. In this case, the appellant Kamala had admitted the existence and execution of Ex.A1-Will. Therefore, I would therefore go by the ratio laid down in the aforesaid Division Bench of the Madras High Court. Once I hold that Ex.A1-Will had been proved, the necessary conclusion is that Manickam was given only life estate along with his wife and the properties were to ultimately devolve on the grand nephew of the testator. Therefore, the appellant Kamala can no longer fall back on Ex.B12-Will. Ex.B12-Will has to necessarily fail in respect of the property that is the subject matter of O.S.No.646 of 1996. It is true that the father Thiru.Manickam had dealt with the property by mortgaging the same and they have been subsequently redeemed either by the father or by the appellant. The learned counsel for the appellant would state that that would come in the way of the plaintiff from getting the relief of declaration and recovery of possession. I am not persuaded by this submission. Whatever mortgage was created by Thiru.Manickam could have been valid only till his life-time. Redemption of the mortgage by the appellant is no defence.

13.The substantial questions of law formulated in SA(MD)No.1038 of 2008 are answered against the appellant. The judgment and decree made in A.S.No.357 of 2005 is sustained. S.A.(MD)No.1038 of 2008 is dismissed. The judgment and decree made in A.S.No.59 of 2004 is set aside. S.A.(MD)No.1012 of 2008 is allowed. No costs.

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

skm

<https://hcservices.ecourts.gov.in/hcservices/>



To

1.The Principal District Judge, Trichirappalli.

2.The Sub Judge, Trichy.

3.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.V.SASI KUMAR, Advocate (SR-23820[F] dated 26/07/2021)

S.A. (MD) Nos.1012 and 1038 of 2008

22.07.2021

MGJ/PM(11.11.2021) 7P 6C