



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 15.07.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.748 of 2007 and

M.P.(MD)No.1 of 2007

WEB COPY

A.K.C.Murugan

... Appellant/Appellant/
1st Defendant

Vs.

1. Selva Seethalakshmi

... Respondent/Respondent/
Plaintiff

2. Jeyakodi

3. Jegathambal

4. Ramathilagam

5. Jeyakumar

... Respondents 2 to 5/
Respondents 2 to 5/
Defendants 2 to 5

Prayer: Second appeal filed under Section 100 of C.P.C., against the Judgment and Decree passed in A.S.No.2 of 2007 on the file of the Subordinate Judge, Kovilpatti, dated 20.04.2007 confirming the Judgment and Decree passed in O.S.No.258 of 2004 on the file of the District Munsif Court, Kovilpatti, dated 27.07.2006.

For Appellant : Mr.Venugopal,
for Mr.M.P.Senthil.

For R-1 : Mr.V.Meenakshisundaram

For R-2 & R-3 : Mr.M.Jothi Basu

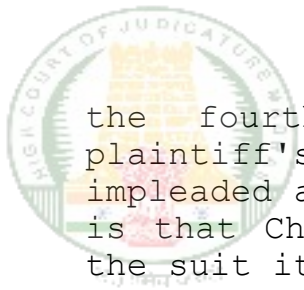
For R-4 & R-5 : Mr.G.Vidhya Maheswaran

* * *

J U D G M E N T

The contesting defendant in O.S.No.258 of 2004 on the file of the District Munsif Court, Kovilpatti, is the appellant in this second appeal.

2. The said suit for partition was instituted by one Selva Seethalakshmi, the first respondent herein. The case of the plaintiff was that the suit properties belonged to one Chellaiya Thevar. Chellaiya Thevar had two sons, namely, A.K.C.Murugan and A.K.Kaliyappan and two daughters, namely, Jeyakodi and Jagathambal. The plaintiff Selva Seethalakshmi was the daughter of A.K.Kaliyappan who died in the year 1993. A.K.Kaliyappan is said to have married



the fourth defendant Ramathilagam after the demise of the plaintiff's mother and begotten a son by name Jeyakumar who was impleaded as the fifth defendant. The specific case of the plaintiff is that Chellaiya Thevar died intestate in the year 1968 and that the suit items have not been partitioned.

WEB COPY

3. The appellant herein who was shown as the first defendant filed written statement contending that the suit item No.1 which is a dwelling house was bequeathed in his favour by a registered will dated 13.12.1967(Ex.B.1). He also controverted the other averments put forth by the plaintiff. The learned trial Munsif framed the necessary issues. The plaintiff examined herself as P.W.1 and also examined two other witnesses on her side as P.W.2 and P.W.3. Ex.A.1 to Ex.A.12 were marked. The appellant examined himself as D.W.2 and three other witnesses were examined on the side of the defendants. Ex.B.1 to Ex.B.29 were marked on their side. After considering the evidence adduced on either side, the trial Court by judgment and decree dated 27.07.2006 granted preliminary decree in favour of the plaintiff granting her 1/12th share. Defendants 4 and 5 who were the second wife and son of the plaintiff's father were granted 1/12th share each. Aggrieved by the same, the first defendant/appellant herein filed A.S.No.2 of 2007 before the Sub Court, Kovilpatti.

4. The first appellate Court by judgment and decree dated 20.04.2007 dismissed the appeal and confirmed the decision of the trial Court. Challenging the same, this second appeal came to be filed.

5. This second appeal was admitted on the following substantial question of law:-

"Whether the findings of the Courts below are vitiated by its failure to consider the evidence of D.W.1 and D.W.3 with reference to Ex.B.1 will and the proof by the evidence of D.W.3 as contemplated under Section 63 of the Indian Succession Act?"

6. The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds and he took me through the testimony of D.W.1. According to him, Suit item No.1 was bequeathed in favour of the appellant herein vide an unregistered will dated 13.12.1967. The original will formed part of the documents. Since the original will was with the bank, the appellant examined the bank official/D.W.1 who categorically deposed before the Court below that the photocopy was compared with the original. Therefore, his contention is that the Court below erred in holding that the appellant's case has to fail for non-production of the original will. He submitted that Section 65 of the Indian Evidence Act, 1872 contemplates cases in which secondary evidence relating to documents may be given. The Courts below failed to take note of the aforesaid provision. He therefore called upon



the appellant and allow this appeal by setting aside the impugned judgment and decree.

7. Per contra, the learned counsel appearing for the respondent submitted that the impugned judgment does not call for any interference.

8. I carefully considered the rival contentions and went through the evidence on record.

9. The suit for partition was resisted by the appellant herein on the strength of the will dated 13.12.1967 said to have been executed by Chellaiya Thevar. Therefore, the burden to prove the same lay squarely on the appellant. The question is whether the appellant had discharged his burden. The appellant could have discharged the burden only by producing the original will before the Court below and by examining the attestors. The appellant had failed to produce the original will before the Court below. Of course there is evidence through D.W.1 that the original will had been deposited by the appellant before the local bank; the bank official had also deposed that they had compared the original will with the photocopy.

10. I am afraid that this testimony of D.W.1/bank official cannot come to the rescue of the appellant. The original will ought to have been produced before the Court below and if at all the comparison could have been done only by the Court and not by the bank official. Section 65 of the Indian Evidence Act, 1872 reads as follows:-

" 65. Cases in which secondary evidence relating to documents may be given.--

Secondary evidence may be given of the existence, condition or contents of a document in the following cases: --

(a) when the original is shown or appears to be in the possession or power --

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;



(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

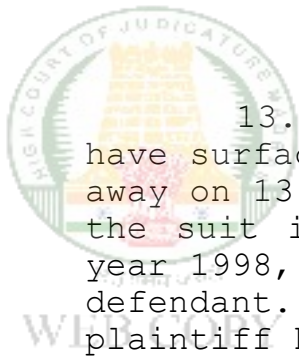
In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents. "

11. The case on hand does not fall under any of the circumstances set out in Section 65 of the Indian Evidence Act, 1872. More than anything else, the suit was instituted on 17.07.2002. The first defendant must have been served with the said summons shortly thereafter. The appellant had fairly admitted in his evidence that only in the year 2004, he mortgaged the suit item No.1 with the local bank and also filed the said document as a part of the mortgage transaction. He also admitted that in the year 2001, he mortgaged the property. But then, redemption was made in the very same year. In other words, only two years after the filing of the suit, the document left the hands of the first defendant/appellant herein. The first defendant should have filed the original will along with the written statement. He could have filed an application to compel the bank to produce the original will before the Court. He had not done so. Therefore, the Courts below had rightly declined to permit the appellant to take shelter behind Ex.B.1.

12. That apart, there are few other circumstances that throw some doubt on the defence of the appellant. The will is said to have been executed on 13.12.1967. Some eight months thereafter, a mortgage was executed jointly by the father of the plaintiff and the first defendant. The registered Othi deed was marked as Ex.A.12. In Ex.A.12, the recitals read that following the demise of Chellaiya Thevar, suit item No.1 had devolved jointly on the executants. If really the Will had come into force, the first defendant should have mortgaged the property on his own and there was no need to join his brother Kaliyappan.



13. It is also admitted that the ' Will ' does not appear to have surfaced for almost twenty eight years. Chellaiya Thevar passed away on 13.02.1968. Till 1996, the taxes were remitted in respect of the suit items only in the name of Chellaiya Thevar. Only in the year 1998, mutation appears to have been made in favour of the first defendant. These circumstances led the Courts below to hold that the plaintiff had made out a case for partition. Therefore, the approach of the Courts below cannot be said to be erroneous. I answer the substantial question of law against the appellant.

14. At this stage, the learned counsel appearing for the appellant states that suit item No.1 is a dwelling house in which the appellant had been residing for several decades. He also took me through the evidence of the other witnesses from which it can be seen that the appellant as the eldest son of Chellaiya Thevar had performed the marriages of the sisters also. Therefore, in the final decree proceedings, this equity obtaining in favour of the appellant will be borne in mind by the Courts below and suit item No.1 will be allotted to the appellant. But then, valuation exercise must be done and the appellant will have to give up his share in the remaining suit items correspondingly and proportionately.

15. With this direction, the judgment and decree passed by the first appellate Court are confirmed and the second appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

PMU

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The Subordinate Judge,
Kovilpatti.
2. The District Munsif,
Kovipatti.



COPY TO:

The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.M.P.SENTHIL, Advocate (SR-22812[F] dated 16/07/2021)

+1 CC to M/s.G.M.LAW OFFICE, Advocate (SR-22813[F] dated 16/07/2021)

S.A.(MD)No.748 of 2007
15.07.2021

_RD/NS(22.11.2021) 6P 7C