



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 25.10.2021

CORAM:

THE HONOURABLE MR. JUSTICE G.R. SWAMINATHAN

SA(MD) Nos. 681 of 2010 & 167 of 2012

&

CMP(MD) No. 8360 of 2021 & MP(MD) No. 1 of 2010

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in SA(MD) No. 681 of 2010 : -

1. B. Vibularani

2. Gomathi Ammal (died)

3. A. Subburam

4. Dr. A. Babu

5. K. Subbulakshmi

6. K. Sargunam ... Defendants 3 to 6, 12 & 13 /
Appellants 1 to 6 / Appellants

(Memo in USR No. 17107 dated 09.08.2021 was recorded as 2nd appellant died & appellants 3 to 6 who are already on record as Lrs of the deceased 2nd appellant vide court order dated 31.08.2021)

vs.

1. A. Subbammal ... 2nd plaintiff /
1st respondent / 1st respondent

2. R. Thilagam (died)

3. S. Rohini Devi

4. S. Rathi Devi

5. R. Balaji

6. R. Anitha (died) ... Defendants 7 to 11 / Respondents 2 to 6
/ Respondents 2 to 6

7. R. Madhavan

8. Minor M. Mangalshree

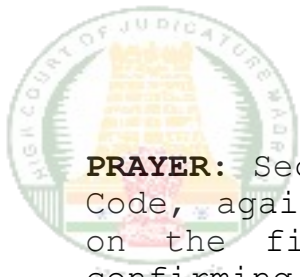
9. Minor Yuvashree ... Respondents

(R7 to R9 are brought on record as LRs of the deceased R6 vide court order dated 11.02.2020)

(Minor respondents 8 & 9 are represented through their guardian & father R. Madhavan, 7th respondent)

(Memo in USR No. 17906 dated 30.11.20 filed on 09.08.2021 was recorded as respondents 3 to 5 and 7 to 9 who are already on record are the LRs of the deceased R2 vide court order dated 31.08.2021)

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



PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed in A.S No.10 of 2004 on the file of the Sub Court, Srivilliputhur dated 24.07.2009 confirming the judgment and decree passed in O.S No.57 of 1996 on the file of the Principal District Munsiff Court, Srivilliputhur dated 06.10.2003.

For Appellants	: Mr.A.Arumugam for M/s.Ajmal Associates
For Respondents	: Mr.M.Vallinayagam, Senior Counsel for Mr.D.Nallathambi for R1 Mr.M.S.Balasubramaniya Iyer for R3 & R4 Mr.S.Parthasarathy for R5, R7 to R9

in SA(MD)No.167 of 2012 : -

Subbammal	... Appellant / Appellant / 2 nd Plaintiff
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vs.

1.Vibularani
2.Gomathiammal (died)

(Memo dated 30.07.2021 filed on 04.08.2021 in USR No.16815 was recorded as 2nd respondent died & respondents 3, 4, 10 & 11 who are already on record were recorded as LRS of the deceased 2nd respondent vide court order dated 31.08.2021)

3.Subburam

4.Dr.A.Babu

5.R.Thilagam (died)

(Memo dated 18.11.2020 filed on 23.11.2020 in USR No.15685 is recorded as 5th respondent died and respondents 6, 7, 8, 12, 13 & 14 who were already on record were recorded as LR of the deceased R5, vide order dated 31.08.2021)

6.S.Rohini Devi

7.RadhiDevi

8.R.Balaji

9.R.Anitha (died)



10.K.Subbulakshmi

11.K.Sargunam

12.R.Madhavan

13.Minor Mangalshree

14.Minor Yuvashree

...Respondents /

Respondents / Defendants 3 to 13

... Respondents

(RR 12 & 14 were brought on record as LR's of the deceased R9 vide Court order dated 16.12.2020 in MP (MD)No.1 of 2014 to 3 of 2014)

(Minor respondents 13 and 14 are rep.by their father & natural guardian/12th respondent)

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed in A.S No.88 of 2004 dated 24.07.2009 on the file of the Sub Court, Srivilliputhur confirming the judgment and decree dated 06.10.2003 passed in O.S No.57 of 1996 on the file of the Principal District Munsif Court, Srivilliputhur.

For Appellants	:	Mr.M.Vallinayagam, Senior Counsel for Mr.D.Nallathambi
For Respondents	:	Mr.A.Arumugam for M/s.Ajmal Associates for R1 to R4, R10 and R11 : Mr.M.S.Balasubramaniya Iyer for R6 and R7 Mr.S.Parthasarathy for R8, R12 to 14

COMMON JUDGMENT

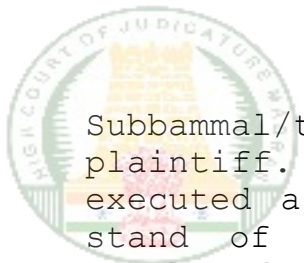
The plaintiff in O.S No.57 of 1996 on the file of the Principal District Munsif Court, Srivilliputhur is the appellant in SA(MD) No.167 of 2012. Defendants 3 to 6, 12 and 13 in the said suit are the appellants in SA(MD)No.681 of 2010. The said suit was originally filed by Rengammal, the mother of Subbammal, Alagarsamy and Rengasamy (D1 and D2). The suit was filed seeking the following reliefs :

"1.To declare that the suit first schedule belongs to her.

2.To declare that she was entitled to enjoy the suit second schedule during her lifetime.

3.For partition and separate possession of her 1/12th share in the suit third schedule."

Since the contesting defendants were in possession of the suit items 1 and 2, she also wanted the relief of accounting. After filing the suit, Rengammal passed away on 26.10.1992. Thereupon,



Subbammal/third defendant got herself transposed as the second plaintiff. The case of Subbammal was that her mother Rengammal had executed a registered Will dated 30.12.1990 in her favour. The stand of the plaintiff was that the suit first schedule was purchased by Rengammal and that it belonged to her absolutely. There was exchange of notices between Rengammal on the one hand and her sons on the other. It was contended by the sons that their mother-Rengammal had already settled the suit first schedule in their favour vide settlement deed dated 29.08.1957. In the reply statement, Rengammal denied having executed any such settlement deed. Defendants 1 and 4 filed written statement controverting the plaint averments. Based on the divergent pleadings, the trial court framed as many as twelve issues. The plaintiff examined herself as PW.1. The attestors of the Will dated 30.12.1990 were also examined as PW.2 and 3. Exs.A1 to A9 were marked. The third defendant Vibularani and fifth defendant Subburam were examined as DW.1 and DW.2. Exs.B1 to B28 were marked. After consideration of the evidence on record, the trial court by judgment and decree dated 06.10.2003 dismissed the suit as regards the suit schedule 1 and 2 and decreed the suit as regards the third schedule. It was declared that Subbammal will be entitled to 2/12th share in the third suit schedule and that defendants 7, 9 to 11 will be entitled to 19/48th share in the third schedule. A preliminary decree was passed to that effect and the parties were given liberty to file separate proceedings under Order 20 Rule 12 of CPC. Aggrieved by the same, the appellants in SA(MD)No.681 of 2010 filed A.S No.10 of 2004 before the Sub Court, Srivilliputhur. Subbammal filed A.S No.88 of 2004 before the Sub Court, Srivilliputhur. Both the appeals were heard together. Judgment and decree dated 24.07.2009 was passed confirming the judgment and decree passed by the trial court and both the appeals were dismissed. Aggrieved by the same, Vibhularani and others filed SA(MD)No.681 of 2010 while the plaintiff Subbammal filed SA(MD)No.167 of 2012. SA(MD)No.167 of 2012 was admitted on the following substantial questions of law :

"1.When under Ex.B2, the beneficiaries are to get absolute right only after the death of the executant, whether the finding of the court below that the said document is a settlement deed is correct under law ?

2.When the presumption contemplated under Section 90 of the Evidence Act can be applied only regarding the signature and handwriting of the executant, whether the courts below are correct in accepting the interpretation put forward by the first defendant, regarding the nature and character of the document, Ex.B2 without any other independent evidence, that too, when the executant herself treated Ex.B2 only as her 'Will'?"

Only notice of admission was ordered in SA(MD)No.681 of 2010 and it had not been admitted till date.

2.Heard the learned counsel on either side.

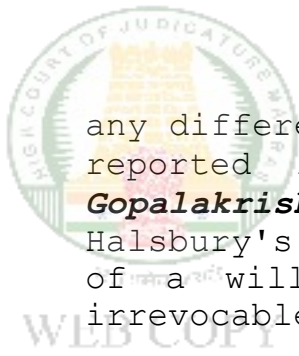
<https://hcservices.ecourts.gov.in/hcservices/>



3. Before this Court, the fourth defendant Vibularani and the legal heirs of the first defendant stand on the one side while the plaintiff Subbammal and the legal heirs of the second defendant are standing on the other side. Subbammal and the LRs of the second defendant advanced common arguments. They pointed out that the suit first schedule belonged to Rengammal. The stand of her sons, namely, Alagarsamy and Rengasamy was that the property had been settled in their favour under Ex.B2 dated 02.09.1957 and that under Ex.B2 their mother Rengammal retained the right to enjoy the property during her lifetime and her sons were to take the property absolutely after her lifetime.

4. The question that arises for consideration is whether Ex.B2 has to be construed as a Will/testament or as a settlement deed. The construction of Ex.B2 has considerable implications for the rights of the respective parties. This is because Rengammal had executed a Will dated 30.12.1990 (Ex.A5) in favour of Subbammal. If Ex.B2 dated 02.09.1957 is construed as a Will, then, that would stand displaced and superseded by Ex.A5 and Subbammal will be entitled to take suit first schedule also. If it is construed as a settlement deed, then, Subbammal cannot have any right over the first schedule.

5. The learned Senior counsel appearing for the plaintiff as well as the other learned counsel took me through the original document itself. The learned Senior Counsel Mr. Vallinayagam pointed out that Rengammal was an illiterate woman. She had neither put her signature nor her thumb impression. A mere scribbling is there. In the said document, several corrections were found. Placing reliance on the decision of the Privy Council reported in **AIR 1937 PC 274 (Omanhene Kwamin Bassayin vs. Omanhene Bendentu II)**, the learned Senior counsel submitted that where a person not knowing English has affixed his mark, the onus to prove that the document was appropriately explained and interpreted to the person affixing his mark or something, is on the party relying on the document. He further submitted that this principle is squarely applicable to the case of execution of a document by a illiterate lady. He placed further reliance on the decision reported in **AIR 1937 Privy Council 113 (Shri. Kishore Ray Thakur vs. Basanti Kumar Das)**. His pointed contention is that the document is sought to be propounded only by the first defendant and hence, the burden to prove is upon him. He contended that the first defendant as well as the fourth defendant miserably failed to discharge the burden cast on them. He also submitted that merely because the document has been styled as a settlement document, that would not make it a deed of settlement. In the case on hand, Ex.B2 categorically states that her sons were to take the property only after her lifetime. This is a classic feature of any Will. He also states that even though a document may contain a clause that it is irrevocable, that will still not make



any difference. In this regard, reliance was placed on the decision reported in **AIR 1978 Mad 54 (Ramaswami Naidu and Ors. vs. Gopalakrishna Naidu and Ors)** wherein the proposition laid down in Halsbury's Laws of England to the effect that the revocable nature of a will cannot be lost, even by a declaration that it is irrevocable or by a covenant not to revoke it was approvingly cited.

6. Responding to the contention of the learned counsel for the appellants in SA(MD)No.681 of 2010 that even during the lifetime of Rengammal, the second defendant sold his interest in the suit first schedule in favour of Vibularani/3rd defendant, he submitted that the true character of a document cannot be determined by the subsequent conduct of the parties.

7. I have serious doubts as to whether the legal heirs of D2 can endorse the said plea. This is because the stand taken in the written statement filed by the first defendant that Ex.B2 is only a settlement deed and not a Will was not contested by the second defendant. But I cannot lose sight of the fact that Subbammal, the plaintiff in the suit is definitely entitled to canvass this contention.

8. The plaintiff in response to the written statement, had filed her reply statement. In the reply statement, the plaintiff only took a stand that Ex.B2 never came into force. That is why, the trial court did not frame any issue as to whether Ex.B2 has to be construed as a settlement deed or as a Will. Even though no such issue was framed in this regard, from a reading of the trial court's judgment and the discussion found in Paragraph No.18, it can be seen that the matter was argued at length before the court below regarding the true character of Ex.B2. In any event, a substantial question of law has been framed in this regard and it is my bounden duty to answer whether Ex.B2 is a settlement deed or Will. Ex.B2 has been styled as a settlement document. It is true that the nomenclature given to a document cannot be determinative of its character. It is true that even under a deed of settlement, the settlor can retain the right to enjoy the settled property during her lifetime and direct that the settlees will take the property only after her lifetime. In Ex.B.2, there is a specific sentence stating that the executant had given an application in the Sub Registrar office for changing the patta in the names of the settlees. Of course, this sentence appears to have been added after the original draft. The learned counsel for the plaintiff would also contend that there is no endorsement in the document to show that this was added before registration.

9. It is true that there are quite a few changes and additions and interlineation in Ex.B2. If according to the plaintiff and the sailing respondents, these features throw considerable doubt on the very authenticity and genuineness of the document, nothing prevented



them from applying for a certified copy. In the pleadings also, the stand taken by the plaintiff was only that Ex.B.2 did not come into force. In my view, this single sentence occurring in Ex.B2 for effecting mutation in the revenue record shows the intention of the executant.

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10. Though the learned counsel did not stress this point and there is also no plea, I do take note of the fact that Subba Naidu, the father of the parties executed a settlement deed (Ex.B1) in favour of Subbammal settling some six acres of land in her favour. The fact that a settlement executed by the father in favour of the daughter vide Ex.B1 and three days later, the settlement deed was executed by the mother in favour of the sons vide Ex.B.2 throws considerable light on the true character of the document.

11. Therefore, I sustain the finding of the court below that Ex.B2 is only a deed of settlement and not a deed of Will. The concurrent findings of the courts below are confirmed and I answer the substantial questions of law against the plaintiff Subbammal. As regards the suit second schedule, even according to the original plaintiff she had only a life estate. Following her demise, the counsel for Subbammal made an endorsement that there is no contest as regards the suit second schedule. There is no dispute that the suit second schedule was the absolute property of Subba naidu and he had given only life estate in favour of his wife Rengammal. The courts below specifically declined the relief of accounting as regards the suit second schedule and when there is no challenge to the same, the question of going into the same does not arise at all.

12. Now comes the third schedule. The third suit schedule property absolutely belonged to Subba Naidu. The said property is admittedly a coparcenary property. Following his demise, as per the law then prevailing, Alagarsamy Naidu and Rengasamy Naidu were entitled to $1/3^{\text{rd}}$ plus $1/12^{\text{th}}$ share each in the property. Rengammal and Subbammal were each entitled to $1/12^{\text{th}}$ share. Since Rengammal had executed a Will (Ex.A5), in favour of Subbammal and the same was also duly proved in accordance with law, her $1/12^{\text{th}}$ share will devolve on Subbammal. The stand of the contesting defendants was that in view of Ex.B1, Subbammal had relinquished her share in the suit third schedule property. It was also pleaded that the relinquishment was orally made by Subbammal. In fact, the plea of ouster was also made. The courts below have concurrently found that this plea has not at all been established. As rightly contended by the learned Senior Counsel for the plaintiff and the sailing respondents, any such relinquishment has to be necessarily through a registered document. It cannot be orally made. The character of the property has been answered by the courts below and there is no challenge to the said finding. The courts below applying the law then in force rightly held that Subbammal will be entitled to $2/12^{\text{th}}$ share in the suit third schedule property.



13. Now, the only question that arises for consideration is whether the share of Subbammal in suit third schedule will get enlarged in view of the amendment made to Section 6 of the Hindu Succession Act as interpreted by the Hon'ble Supreme Court in Vineeta Sharma v. Rakesh Sharma (2020) 9 SCC 1. The learned Senior Counsel as well as the learned counsel for the sailing respondents would strongly contend that a reading of the said judgment of the Hon'ble Supreme Court would show that the daughter becomes coparcener by birth and that it is not necessary that there should be a living coparcener or father as on the date of the amendment to whom the daughter would succeed. The plaintiff has also filed an application for amending the plaint seeking allotment of 6/16th share in the suit third schedule.

14. In fact, filing of such an application is not really necessary. If I hold that the plaintiff is entitled to enlarged share in the light of the aforesaid decision of the Hon'ble Supreme Court, I am bound to modify the preliminary decree accordingly. This Court is obliged to take note of the subsequent development and mould the relief. The Hon'ble Supreme Court has also held that the rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004. I specifically asked the learned counsel on either side, as to whether the suit third schedule is still available intact or whether any alienations or partition had taken place. The counsel are not quite sure of the position. Hence, I hold that subject to any such alienations, the plaintiff is entitled to 6/16th share in the suit third schedule. D7 to D11 who happen to be the legal heirs of D2 are entitled to 5/16th share in the suit third schedule. It is stated that they have also paid the requisite court fee. SA(MD) No.681 of 2010 stands dismissed. SA(MD) No.167 of 2012 is partly allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2022

Sub Assistant Registrar (CS)

skm

To

1. The Sub Judge, Srivilliputhur.



2.The Principal District Munsiff, Srivilliputhur.

Copy To

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

+2 CC to M/s.AJMAL ASSOCIATES, Advocate (SR-32676,32677[F] dated
26/10/2021)

+2 CC to M/s.D. NALLATHAMBI, Advocate (SR-32743,32742[F] dated
26/10/2021

SA (MD) Nos.681 of 2010 & 167 of 2012
25.10.2021

RK(25.01.2022) 9P 9C