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S.A(MD)No.724 of 2012

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 06.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A(MD)No.724 of 2012

and

M.P.(MD)No.1 of 2012

Deivalakshmi ... Appellant/3rd Respondent/3rd Defendant
-Vs-

1.S.Karupagavalli

2.S.Avudai Ammal

... Respondents 1 & 2/Respondents 1 & 2/
Plaintiffs 1 & 2

3.A.Pon Karuppasamy

... 3rd Respondent/Appellant/2nd Defendant

4.A.Karuppasamy

... 4th Respondent/4th Respondent/1st Defendant

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree made in A.S.No.4 of 2011 dated 31.01.2012 on the file of the Additional District Judge / Fast Track Court No.II, Thoothukudi modifying the judgment and decree made in O.S.No.192 of 2007 dated 05.01.2009 on the file of the Principal District Munsif Court, Thoothukudi.

For Appellants : Mr.M.Thirunavukkarasu

For R1 & R2 : Mr.S.M.Mohan Gandhi

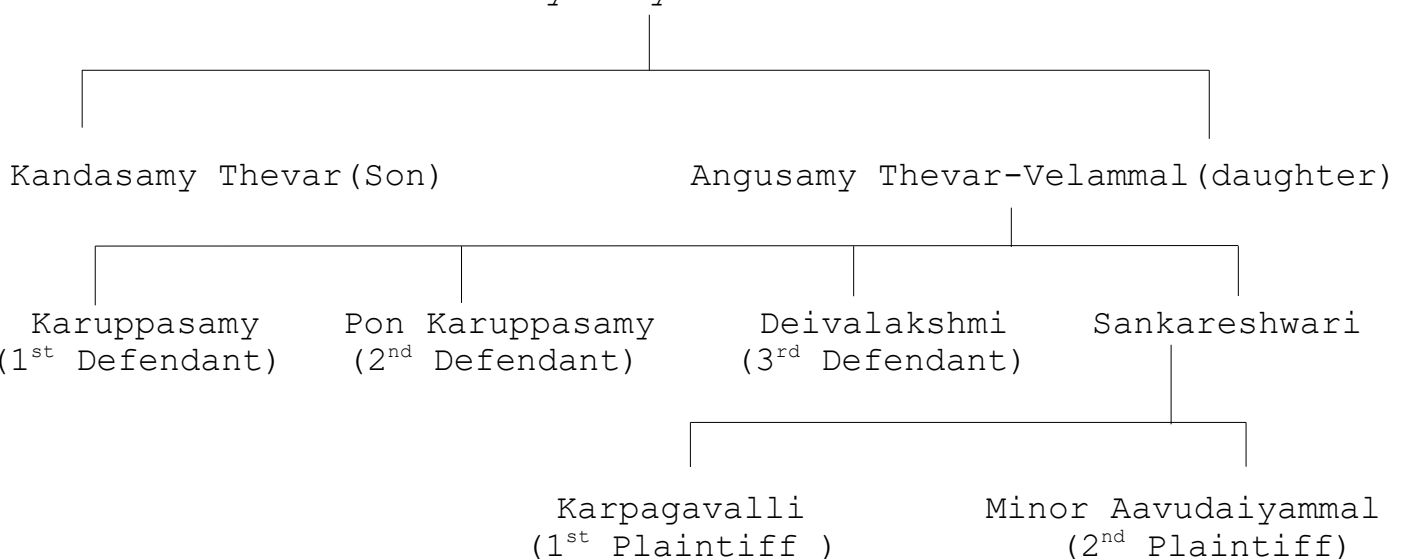
For R3 & R4 : Mr.R.Nanda Kumar

JUDGMENT

This second appeal arises out of a partition suit in O.S.No.192 of 2007 on the file of the Principal District Munsif Court, Thoothukudi. The third defendant in the suit is the appellant herein.

2.The genealogy is as follows:-

Periyasamy Thevar





3.The respondents 1 and 2 filed the said suit claiming partition and separate possession of 1/4th share in the suit properties. The suit properties are 12 in number. The appellant was shown as the 3rd defendant. The plaintiff's mother Sankareshwari already passed away. The defendants 1 and 2 are the brothers of the plaintiff's mother Sankareshwari. According to the plaintiffs, the suit items 1 to 10 were allotted to the share of their grandmother Velammal in a partition suit and that items 11 and 12 belong to the grandfather Angusamy Thevar. The case of the plaintiffs is that they have inherited their mother's 1/4th share in all the suit items. The defendants 1 and 2 contested the suit contending that their grandmother Velammal had executed Ex.B2 in their favour. The first plaintiff Karpagavalli examined herself as P.W.1 and marked Ex.A1 to Ex.A5. The first defendant Karuppasamy examined himself as D.W.1. The appellant examined herself as D.W.3. one Premavathi was described as attesor/scribe of Ex.B2-Will dated 02.03.2001 said to have been executed by Velammal and she was examined as D.W.2. On the side of the defendants, Ex.B1 dated 29.09.2003 order in E.P.No.91 of 2003 was also marked. After considering the evidence on either side, the trial Court by judgment and decree dated 05.01.2009 granted preliminary decree allotting 1/4th share in favour of the plaintiffs as well as the appellant in all the suit items. Aggrieved by the decision of the trial Court, the second defendant Pon Karuppasamy filed A.S.No.4 of 2011 before the Additional District Judge/Fast Track Court No.II, Thoothukudi. By the impugned judgment and decree dated 31.01.2012, the appeal was partly allowed and the judgment and decree of the trial Court was modified. The plaintiffs were granted 1/12th share in the items 11 and 12. The suit was dismissed as regards items 1 to 10. Challenging the same, this second appeal came to be filed.

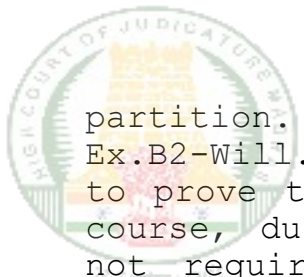
4.The second appeal was admitted on the following substantial questions of law:-

(a) Whether the defendants 1 and 2 have proved the execution and attesting of Ex.B2-Will as required under Section 68 of the Evidence Act and Section 63 of the Indian Succession Act?

(b) Whether the burden of proof lies upon the defendants 1 and 2 the person produced the Will or the plaintiffs and whether the lower appellate Court is right in shifting the burden upon the plaintiffs to prove the execution of Will ?

5.Heard the learned counsel on either side.

6.There is no dispute that suit items 1 to 10 belonged to Velammal and items 11 and 12 belonged to Angusamy Thevar. The scope of the contest in the second appeal is only regarding the items 1 to 10. The sons of Velammal namely Karuppasamy and Pon karuppasamy contended that Velammal by executing Ex.B2 had bequeathed the said



partition. The question therefore turns on the genuineness of Ex.B2-Will. It is well settled that the propounder of the Will has to prove the same. Ex.B2-Will is an un-registered document. Of-course, during the relevant time, the testamentary instrument did not require registration. On that score, Ex.B2-Will cannot be disregarded. Section 68 of the Indian Evidence Act contemplates that Will has to be proved through one of the attestors. Premavathi is said to be one of the attestors. She was examined as D.W.2. Premavathi is none other than Pon Karuppasamy's wife's niece. The Will is said to have been executed on 02.03.2001. It is not in dispute that there was a partition suit between Velammal and her brother Kandasamy Thevar and that the suit items 1 to 10 were allotted to Velammal in O.S.No.119 of 1993. The final decree was passed and to take delivery of these two items, E.P.No.91 of 2003 came to be filed. I checked the records, if this Will was marked in E.P.No.91 of 2003. There cannot be any dispute that the Will has surfaced only in the present proceedings and it was not marked in E.P.No.91 of 2003. When the Will has not surfaced at the appropriate time, that is certainly a suspicious circumstance. If the Will had been duly registered, that would have to a substantial extent allayed doubts that arise in the mind of the Court. The propounders of the Will have projected the same only in the present proceedings and not in E.P.No.91 of 2003.

7. There are also material contradictions between the testimonies of D.W.1-Karuppasamy and D.W.2 Premavathi. D.W.1-Karuppasamy claimed that the appellant herein namely Deiva Lakshmi was present, when Velammal executed the suit Will. However, Premavathi-D.W.2 would strongly assert that Deiva Lakshmi was nowhere in the scene. D.W.1 claimed that the document writer wrote the Will. But D.W.2-Premavathi claimed that it was she who wrote the Will. D.W.2 also stated that the testatrix affixed her thumb impression after D.W.2 put her signature. Since the beneficiary under the Will are the defendants 1 and 2, to instil confidence in the mind of the Court, the other witness could have been examined. No explanation is forthcoming for non-examination of Ruban / other person said to be the second attestor.

8. Taking note of all these aspects, I have to necessarily give a finding that Ex.B2-Will cannot be accepted. Once Ex.B2 is eschewed out of consideration, each of the units will be entitled to 1/4th share in all the suit items. The substantial questions of law are accordingly answered. The judgment and decree passed by the first appellate court is set aside. The judgment and decree passed by the trial Court is restored in *toto*.



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9.The second appeal is allowed. No costs.
connected miscellaneous petition is closed.

Consequently,

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To

1.The Additional District Judge / Fast Track Court No.II,
Thoothukudi.

2.The Principal District Munsif,
Thoothukudi.

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The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1 CC to M/s.M.THIRUNAVUKARASU, Advocate (SR-28366[F] dated
07/09/2021)

+1 CC to M/s.S.M.MOHAN GANDHI, Advocate (SR-28401[F] dated
07/09/2021)

Judgment made in
S.A(MD)No.724 of 2012
and
M.P. (MD)No.1 of 2012
06.09.2021

SRR (CO)

RS/SKN (17.11.2021) 4P 7C