



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATE: 17.12.2021

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THE HON'BLE MRS.JUSTICE **V. BHAVANI SUBBAROYAN**

S.A.(MD) No.303 of 2021

and

C.M.P.(MD)No.4096 of 2021

1.Savariammal

2.Sahayam

..Appellants/ Appellants/Defendants 1 and 4

vs.

1.Michael Ammal

..1st respondent/1st respondent/ plaintiff

2.Kannan

3.Jeevaraj

..2 &3 respondents/2&3 respondents/
2 &3defendants.

Prayer: Second Appeal filed under Section 100 of CPC against the Judgment and Decree dated 11.12.2020 in A.S. No.48 of 2018 on the file of the learned Sub Court, Ambasamudram confirming the judgment and decree in O.S. No.106 of 2012 dated 31.07.2018 on the file of the learned Additional District Munsif Court, Ambasamudram, seeking for partition.

For Appellants : Mr.A.Sankararamasubramanian

JUDGMENT

This second appeal has been filed against the Judgment and Decree dated 11.12.2020 in A.S. No.48 of 2018 on the file of the learned Sub Court, Ambasamudram confirming the judgment and decree in O.S. No.106 of 2012 dated 31.07.2018 on the file of the learned Additional District Munsif Court, Ambasamudram seeking partition.

2. The case of the plaintiff is that the suit property and northern side of the suit property originally belonged to one Lurdu and he also paid house tax for the same and in possession and enjoyment of the same. Sebastial is the wife of the said Lurdu. They had four children, namely, Savari Ammal, Antony Ammal, Alphonse Savari Anandan and Michael. The said Lurdu, who was born as a Christian, died intestate. After the demise of Lurdu, his wife and children were jointly in possession and enjoyment of the same. In an oral settlement in the family, the suit property alone was allotted to Sebastial Ammal and the northern side of the suit property was allotted to Alphonse Savari Anandan, who is the son of the said Lurdu and father of the defendants 2 and 3 and both of them were in



separate possession and enjoyment of the same. In another family settlement, the first defendant and the plaintiff, who are the daughters of the said Lurdu, were settled separately. Sebastial Ammal executed a registered gift deed in favour of one of her daughters, namely, Antony Ammal. Sebastial Ammal died. Antony Ammal, unmarried daughter of Sebastial Ammal, also died intestate on 18.01.2006. The suit properties were devolved upon the sisters of Antony Ammal, namely, the plaintiff and the first defendant and the children of Alphonse Savari Anandan, namely, the defendants 2 and 3 as per the Indian Succession Act and they were in joint possession and enjoyment of the same. The plaintiff and the first defendant are residing in the suit property. The fourth defendant has no right over the suit property. She was not the legal heir of Antony Ammal. The first defendant along with the fourth defendant declared themselves as legal heirs of Antony Ammal. Therefore, the plaintiff sent a legal notice dated 06.03.2012 to the Vikramasingapuram Municipality and the Branch Office of the Tamil Nadu Electricity Board. Thereafter, on 15.03.2012, when the plaintiff sought for partition, the first defendant had not co-operated. Hence, the suit for partition claiming her 1/3rd share in the suit property.

3. The first defendant filed the written statement contending *inter alia* that the averments contained in the plaint are false. The suit property did not belong to Lurdu, but it belonged to his wife - Sebastial Ammal. On 03.05.1985, Sebastial Ammal had given possession of the same by executing a gift deed in favour of her daughter - Antony Ammal. On 06.01.2006, Antony Ammal executed a Will in favour of the fourth defendant. On 18.01.2006, the Will came into force on the demise of Antony Ammal. Hence, the fourth defendant had the absolute right over the suit property. Therefore, the relief sought for partition by the plaintiff is not maintainable. The northern side of the suit property measuring 2 cents, belonged to Lurdu. The said Lurdu died 30 years back. There was no partition among the legal heirs of Lurdu with regard to his properties. The plaintiff has not included the said property in the suit. The suit is bad for partial partition. The plaintiff had no joint possession over the suit property. The plaintiff had not paid the proper Court fees as per the Tamil Nadu Suit Valuation and Court Fees Act and prayed for the dismissal of the suit.

4. The fourth defendant filed the written statement stating that the address of the plaintiff is false. The plaintiff is not residing in the suit property. On 06.01.2006, Antony Ammal executed a Will in favour of the fourth defendant. Antony Ammal died and thereafter on 18.01.2006 and the Will came into force. Thereafter, the fourth defendant is in independent possession and enjoyment of the suit property. Hence, the plaintiff is not entitled to the relief of partition. Since the fourth defendant is residing in outstation and the first defendant is also aged, the plaintiff with a view to grab the suit property, filed the present suit. The



plaintiff had not paid the proper Court fees. The suit is bad for partial partition. The plaintiff had no joint possession over the suit property and prayed for the dismissal of the suit.

5. Before the trial Court, the plaintiff was examined as PW.1 and Exhibits A1 to A9 were marked. On the side of the defendants fourth defendant was examined as DW.1 and six documents were marked as Exhibits B1 to B6. One Sridhar was examined as DW.2 and one Thavamani was examined as DW.3.

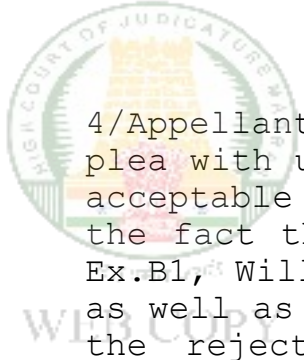
6. On the basis of the rival pleadings made on either side, the trial Court, after framing necessary issues and after evaluating both the oral and documentary evidence, had decreed the suit in favour of the plaintiff and dismissed the claim made by the defendants.

7. Aggrieved by the Judgment and Decree passed by the trial Court, the defendant had filed an Appeal Suit in A.S. No.48 of 2018, on the file of the Sub court, Ambasamudram. The first appellate Court, after hearing both sides and upon reappraising the evidence available on record, had dismissed the appeal and thereby confirmed the Judgment and Decree passed by the trial Court.

8. Challenging the said concurrent Judgments and Decrees passed by the Courts below, the present Second Appeal has been preferred.

9. The learned counsel appearing for the appellants / defendants 1 and 4 would submit that the partial partition was proved by the defendants and the recitals of Ex.A1, which would clearly shows that the remaining property is under the hands of Sebasthiyalammal, which is situated on northern side of the suit property. Therefore, the oral partition in respect of the properties of Loorthu not proved by the plaintiff by adducing any evidence. The courts below failed to note that the defendants clearly proved Ex.B1, Will, dated 06.01.2006, through the evidence of D.W.3, as per Section 69 of Indian Evidence Act. Because, D.W.2 one of the attested witness turned hostile even admitted his signature, therefore the Defendants have no other option to examine of D.W.3, since the other attested witness namely Gomu separated with his wife (D.W.3). The courts below erroneously disbelieved Ex.B6, Mortgage deed, by assuming the possession of the same without considering the fact that Ex.B6 is a registered document and also its recitals clearly shown about the factum of Ex.B1, Will, dated 06.01.2006. Therefore, the courts below wrongly come to the conclusion about Ex.B6, on the basis of possession of documents.

10. The learned counsel for the defendants 1 and 4 would further submit that the courts below failed to discuss about the factum of partial partition as pleaded by the Defendants 1 &



4/Appellants, but the courts below erroneously rejected the said plea with un-discussed manner in the findings of the judgment is not acceptable in the eye of law. The courts below, without considering the fact that the D.W.3 is the wife of another attested witness of Ex.B1, Will and D.W.3 was examined to prove her husband signature as well as the thumb impression (LIT of Anthonyammal) and therefore, the rejection finding of the courts below with regard to the evidence of D.W.3 is not correct either in law or on facts. As per the provision of Section 69 of Indian Evidence Act, since one of the attested witness of Ex.B1, Will turned hostile, the next option of examining the known witness of attested witness signature examined as D.W.3 is acceptable one. The courts below erroneously given finding by believing the revenue tax receipts stands in the name of said Loorthu, which is marked as Ex.A6 in the year 2004-2005. It is settled principles of law that the revenue documents will not create any title with regard to the property, Therefore, the courts below failed to consider about Ex.B3 & Ex.B4 with proper-perspective manner.

11. This Court paid its anxious consideration to the rival submissions made and also carefully perused the materials placed on record.

12. In the Memorandum of Grounds, the defendants 1 and 4 / appellants raised the following substantial question of law for consideration:-

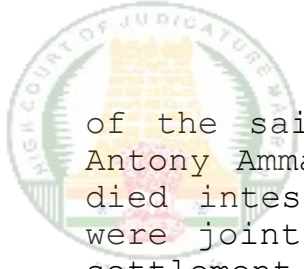
a) Whether the Courts below are correct in decreeing the suit for partition when the Ex.B.1 was proved by the evidence of DW.3 as per Section 69 of Evidence Act?

b) Whether the Courts below rightly rejected the plea of partial partition raised by the defendants 1 and 4 when the plaintiff's not produced any documents to disprove the same?

c) Whether the Courts below correctly rejected the document/ Ex.B.6 by assuming possession of Mortgage deed with 4th defendant?

d) Whether the Courts below rightly accepted the evidence of PW.1 by believing the possession of the suit property even the plaintiff not marked any document to prove the joint possession in the suit property?

13. According to the plaintiff, the suit property and northern side of the suit property originally belonged to one Lurdu and he was in possession and enjoyment of the same. Sebastial is the wife



of the said Lurdu. They had four children, namely, Savari Ammal, Antony Ammal, Alphonse Savari Anandan and Michael. The said Lurdu, died intestate. After the demise of Lurdu, his wife and children were jointly in possession and enjoyment of the same. In an oral settlement in the family, the suit property alone was allotted to Sebastial Ammal and the northern side of the suit property was allotted to Alphonse Savari Anandan, who is the son of the said Lurdu and father of the defendants 2 and 3 and both of them were in separate possession and enjoyment of the same.

14. In another family settlement, the first defendant and the plaintiff, who are the daughters of the said Lurdu, were settled separately. Sebastial Ammal executed a registered gift deed in favour of one of her daughters, namely, Antony Ammal. Antony Ammal, who is an unmarried daughter of Sebastial Ammal, died intestate on 18.01.2006. As per India Succession Act, the suit property devolved upon the sisters of Antony Ammal, namely, the plaintiff and the first defendant and the children of Alphonse Savari Anandan, namely, the defendants 2 and 3 and they were in joint possession and enjoyment of the same. The plaintiff and the first defendant are residing in the suit property. The fourth defendant has no right over the suit property. She was not the legal heir of Antony Ammal. The first defendant along with the fourth defendant declared themselves as legal heirs of Antony Ammal. Therefore, the plaintiff sent a legal notice dated 06.03.2012 to Vikramasingapuram Municipality and the Branch Office of the Tamil Nadu Electricity Board. Thereafter, on 15.03.2012, when the plaintiff sought for partition, the first defendant had not co-operated. Hence, the suit for partition claiming her 1/3rd share in the suit property.

15. According to the first defendant, the suit property did not belong to Lurdu, but it belonged to his wife - Sebastial Ammal. On 03.05.1985, Sebastial Ammal had given possession of the same by executing a gift deed in favour of her daughter - Antony Ammal. On 06.01.2006, Antony Ammal executed a Will in favour of the fourth defendant. On 08.01.2006, the Will came into force on the demise of Antony Ammal. Hence, the fourth defendant had the absolute right over the suit property. Therefore, the relief sought for partition by the plaintiff is not maintainable. The northern side of the suit property measuring 2 cents, belonged to Lurdu. The said Lurdu died 30 years back. There was no partition among the legal heirs of Lurdu with regard to his properties. The plaintiff has not included the said property in the suit. The suit is bad for partial partition. The plaintiff had no joint possession over the suit property.

16. According to the fourth defendant, the plaintiff is not residing in the suit property. On 06.01.2006, Antony Ammal executed a Will in favour of the fourth defendant. Antony Ammal died on 18.01.2006 and the Will came into force. Thereafter, the fourth



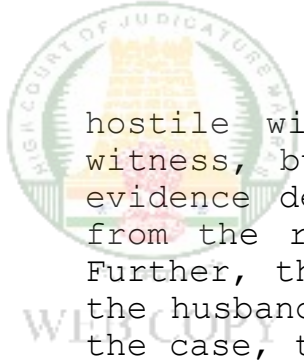
defendant is in independent possession and enjoyment of the suit property. Hence, the plaintiff is not entitled to the relief of partition. Since the fourth defendant is residing in outstation and the first defendant is also aged, the plaintiff, with a view to grab the suit property, filed the suit.

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17. On persual of the documents filed it is found that Ex.P1, dated 03.05.1985 is the registered Gift Deed, executed by one Sebastial Ammal in favour of her unmarried daughter Antony Ammal. P.W.1 in her cross-examination deposed that Ex.P6, House Tax Receipt issued for the year 2004-2005, in respect of the property in Door No.109, initially was in the name of her grandmother Sebastial Ammal. Though the defendants 1 and 4 submitted that they have documents refuting the claim of the plaintiff in respect of the property in Door No.109, they have not produced any evidence before the Court and have not given any explanation to that effect. There are contradictions in the evidence of D.W.3. Therefore, this Court have no other option, except to believe that the property, bearing Door No.109, is in joint possession of the parties.

18. According to the plaintiff, Ex.P1, was executed by one Sebastial Ammal in favour of her daughter Antony Ammal. According to the defendants 1 and 4, the said Antony Ammal executed the Will in favour of the 4th defendant. Ex.D2 and Ex.P2 are the Death Certificate of Antony Ammal. As per Ex.D2 and Ex.P2, Death Certificate the said Antony Ammal died on 18.01.2006. Ex.D1 is the unregistered Will, dated 06.01.2006. According to the plaintiff, the Will was a forged one created by the defendant, but according to the defendants, the Will was proved as genuine by the evidence of D.W.3, as per Law. It is seen from the records that the Will was executed just 12 days before the death of said Antony Ammal. As per Section 69 of Indian Evidence Act, if no attesting witness could be found to be examined to prove the Will, as mandated under Section 68, the Will must be proved by establishing that at least the signature of one attesting witness is in his handwriting and the signature of the testator is in his handwriting. The question is whether there is sufficient evidence to prove that the signature of at least one of the attesting witnesses seen in Ex.P1 & Ex.D1 Will, is in the handwriting of that witness. Normally, a signature is to be proved by the person, who is acquainted with the signature, as provided under Section 47 or by the evidence of an expert, as provided under Section 45 of Indian Evidence Act on the identity of the signature.

19. The only evidence let in on the side of the defendants to prove the execution of the Will is one Sridhar / DW2. But D.W.2 in his evidence though he had admitted that the signature found in the Will, but deposed against the the defendants stating that he was not aware what is written on the Will, who wrote the Will and admitted that it was not written in his presence. Therefore, D.W.1 and 4 filed a petition before the trial Court to declare him as



hostile witness. One Komu / D.W1 also signed in the Will as witness, but, he has not been examined as witness. D.W.3 in his evidence deposed that he did not know who is D.W.2. It is seen from the records that the testator of the Will was not examined. Further, the defendants 1 and 4 have not taken any steps to examine the husband of D.W.3, who is the witness to Ex.D1. When that being the case, this Court has no hesitation to hold that the Will is not proved by the defendants 1 and 4 to be interfered with. The defendants have not produced the alleged gift settlement executed by Sebasthiyammal to Anthoniammal.

20. This partition is sought for the properties of Anthoniammal. The gift deed is accepted by both the parties. But DW.1 was not available and his evidence has not thrown light when the Will was executed. No mutation of records were also done by the defendants earlier point of time and only after suit was filed they have mutated.

21. The contention of the defendants 1 and 4 that the northern side of the suit property ought to have been added in the suit property, but has not been done, and hence, the suit is affected by partial partition, is concerned, the 4th defendant in his cross-examination deposed that it is not necessary to add the northern side of the suit property in the suit. When that being the case, the question that the suit is affected by partial partition does not arise at all. Further, the defendants 1 and 4 not proved that they are in joint possession and enjoyment of the suit schedule properties. Hence, the valuation of the suit is proper and the Court fee paid is correct. The dispute is regarding the property, which stood in the name of Anthoniammal and hence, the claim of partial partition is rejected. Regarding the mortgage deed alleged to have been executed by the first defendant to his sister is also creating doubt, as the Will was executed only on 06.01.2006 but on 17.01.2006,, the Will came into force, on the demise of Antony Ammal, but the original is in his custody has also created a doubt. The defendants' case was rightly rejected by the Courts below, holding that the plaintiff is also entitled to 1/3rd share in the suit property and this Court finds no reason to interfere with the well reasoned Judgments of the Courts below and also there is no question of law much less substantial question of law involved in this Second Appeal for consideration.

22. In view of the forgoing discussions, this Court is of the view that the findings rendered by the trial court and upheld by the first appellate Court, do not warrant any interference by this Court, as the findings given on the issues framed by the Courts below as well as specifically taken up by this Court to reach the root of the controversy, appears to be based upon correct appreciation of oral as well as documentary evidence. Hence, the present appeal fails and is dismissed, accordingly. No costs.



Consequently connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-I)

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/ /2022

Sub Assistant Registrar(CS)

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Note: In view of the present lock down owing to COVID 19 pandemic, a web copy of the order may be utilised 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 Sub Judge, Ambasamudram
2. The Additional District Munsif, Ambasamudram

Copy to

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

+1 CC to M/s.A.SANKARARAMASUBRAMANIAN, Advocate (SR-39789[F] dated 21/12/2021)

S.A.(MD) No.303 of 2021

and

C.M.P.(MD)No.4096 of 2021

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SVN(CO)

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