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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 10.01.2022

PRONOUNCED ON: 04.02.2022

CORAM

THE HON'BLE Mr. JUSTICE G.CHANDRASEKHARAN

S.A.No.760 of 2021

and C.M.P.No.14776 of 2021

1.N.Ravi

2.N.Sasikumar

...Appellants/Defendants 1 & 4

Vs.

S.K.Thirunavukkarasu (Died)

1.Chandra

2.T.Vasudevan

3.D.Lakshmi

4.R.Leelavathi

5.N.Suresh Kumar

6.N.Murali

...Respondents

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 30.01.2017 made in A.S.No.18 of 2012 passed by the learned Subordinate Judge, Tambaram, confirming the judgment and decree dated 01.02.2012 made in O.S.No.144 of 1998 on the file of the learned Additional District Munsif, Alandur.

For Appellants	:	Mr.M.Muthappan.
For Respondents	:	Mr.S.Mukunth for M/s.Sarvabhauman Associates and for R1 to R4 and R6.
For R5	:	No Appearance.

JUDGMENT

This Second Appeal is filed against the judgment and decree in A.S.No.18 of 2012 of the learned Subordinate Judge, Tambaram, confirming the judgment of the learned Additional District Munsif, Alandur in O.S.No.144 of 1998.



2. For the sake of convenience, the parties are referred in the same way, they were referred before the Trial Court.

3. Deceased S.K.Thirunavukkarasu, as a plaintiff filed this suit for partition of the suit properties and allot fifty percent of share to him. He filed the suit stating that the defendants are the sons of his brother Nithyanandan. His father Kullappa Naicker had four sons, namely, 1.Parimelu Alagar, 2.Alaganandan, 3.Nithyanandan and 4.Thirunavukkarasu. Parimelu Alagar and Alaganandan separated from the family thirty years before, after taking away their shares through oral partition. The joint family continued with Kullappa Naicker and his sons Nithyanandan and Thirunavukkarasu. Kullappa Naicker died on 05.02.1981 leaving Thirunavukkarasu and Nithyanandan as his legal heirs. They have been enjoying the suit properties jointly by holding 50% of undivided share each, after the death of Nithyanandan. The defendants, who are appellants 1 and 2 and respondents 5 and 6 in this appeal continued to enjoy the suit properties with Thirunavukkarasu. Thirunavukkarasu and defendants have been contemplating to divide the suit properties by metes and bounds. Thirunavukkarasu issued a notice dated 07.11.1996 for division of the suit properties. First defendant sent reply containing false allegations. Therefore, this suit is filed for the reliefs claimed above.

4. The case of the defendants is that they admit the relationship between the parties. It is denied that Kullappa Naicker disbursed his estate to all his heirs during his lifetime. Thirunavukkarasu was given sufficient property and he separated from the family 35years before. He has no right to claim any share in the father's estate. There is no property left out as joint family property by late Kullappa Naicker. 5acres of land was also sold by heirs of Kullappa Naicker as per his Will after his demise. Kullappa Naicker died on 05.02.1981. Thirunavukkarasu married a girl of his choice and there was no continuance of relationship with his father. He settled at Chennai even prior to his marriage. Suit property is the absolute property of Kullappa Naicker. Thirunavukkarasu was never in joint possession and enjoyment of the suit properties. Kullappa Naicker executed a Will on 07.05.1980 with regard to the suit properties in favour of the defendant's father. He died on 05.02.1981 and the Will had come into force. Defendant's father Nithyanandan became absolute owner of the suit properties. After him the defendants are absolutely entitled to the suit properties. Thirunavukkarasu was out of possession from the suit properties for past 30 years. Therefore, he is not entitled for any reliefs claimed in the plaint.



5. During the pendency of the suit, the sole plaintiff Thirunavukkarasu died. His legal heirs were impleaded as plaintiffs 2 to 5. They are respondents 1 to 4 in this Second Appeal. Thirunavukkarasu's brother Parimelu Alagar's legal heirs were impleaded as defendants 5 and 6. Another brother Alaganathan's legal heirs were impleaded as D7 and D8. Thirunavukkarasu's sisters were impleaded as D9 to D11.

6. During the course of trial, PW1 and PW2 were examined and Exhibits A1 to A11 were marked on the side of the plaintiff. DW1 to DW3 were examined and Exhibits B1 to B21 were marked on the side of the defendants. Exhibits X1 to X3 were also produced through witness.

7. On the basis of the above pleadings, the Trial Court framed the following issues,

i) Whether the plaintiffs are entitled for partition and separate possession of half share (50%) in respect of the suit properties as prayed for?

ii) Whether the suit is bad for non joinder of necessary parties as alleged by the defendants in their written statement?

iii) Whether the Court fee paid by the plaintiffs under Section 37(2) of the T.N.C.F. and S.V. Act is not correct as alleged by the defendants in their written statement?

iv) To what relief?

8. On considering the oral and documentary evidence, the learned Trial Judge found that Thirunavukkarasu and defendants are entitled 50% share each in the suit properties. The exclusive right claimed by the defendants in the suit properties on the basis of Exhibit B1 Will cannot be accepted for the reason that Exhibit B1 Will is not a true and genuine Will. In this view of the matter, the Trial Court decreed the suit as prayed for.

9. The defendants filed appeal in A.S.No.18 of 2012. They have also filed I.A.No.100 of 2012 for reception of additional document. The petition to receive additional documents was filed to receive documents such as patta, Voter ID's, family cards and driving license to prove possession of the defendants. The learned Appellate Judge found from the evidence and submission of the counsel appearing for the parties that, the finding of the Trial Court that Exhibit B1 Will is not executed by Kullappa Naicker is correct. Therefore, filing of additional document would not improve the case of the defendants. Finally, the learned First Appellate Judge dismissed



the petition to receive the additional document in I.A.No.100 of 2012 and the appeal. Challenging the said appeal, the first and fourth defendants have filed this Second Appeal. Second and third defendants have not joined the first and fourth defendants in filing this Second Appeal.

10. The following substantial questions of law arise for consideration in this Second Appeal,

i) Whether the Courts below are right in accepting the opinion of the forensic experts that the signature in the Will is not matched on comparing the signature of the executant?

ii) Whether the Courts below are correct in disbelieving the evidence of the attesting witnesses of the Will as contemplated under Section 68 of the Evidence Act?

iii) Whether the Courts below are right in granting 50% of the share in the suit property since the other legal heirs are not claimed though they are made as party to the suit for partition?

11. The learned counsel for appellants/defendants 1 and 4 submitted that the Courts below have not considered the evidence of DW2 and DW3, who had been examined to prove the Exhibit B1 Will, in right perspective. Both the witnesses have clearly stated about the execution of Exhibit B1 Will by Kullappa Naicker. There is no discussion at all in the judgments of the Courts below as to whether they accept the evidence of DW2 and DW3 or reject their evidence. They mainly relied on the evidence of hand writing expert PW2 Panchatcharam and the report of handwriting expert, marked as Exhibit X1 and X2, to come to conclusion that Exhibit B1 Will was not executed by Kullappa Naicker. When DW2 and DW3 had clearly spoken about the execution of Exhibit B1 Will, rejection of this Will relying on the evidence of PW2 and Exhibit X1 and X2 is contrary to the settled proposition of law. That apart, when it is established that plaintiffs are not in possession and enjoyment of the suit property, allotment of 50% of the share on the ground that they had been in joint possession of the suit property is not on the basis of correct appreciation of evidence and application of law. Therefore, the learned counsel for the appellants prayed for setting aside the judgment of the Courts below and for allowing this Second Appeal.

12. Per contra, the learned counsel for the respondents submitted that defendants claimed that suit properties as absolute properties of Kullappa Naicker. Whether



it is an ancestral property of Kullappa Naicker, Thirunavukkarasu and Nithyanandan or the absolute property of Kullappa Naicker, Thirunavukkarasu and Nithyanandan are each entitled to 50% share in the suit properties. After their death, their legal heirs are entitled to 50% of the share in the suit properties. Kullappa Naicker had executed Exhibit A11 Will on 19.03.1980 in respect of his property. This Will is accepted by all the parties. When he had executed Exhibit A11 Will on 19.03.1980, what is the necessity for him to execute another Will on 07.05.1980 excluding Thirunavukkarasu. There is no explanation. This Will was not produced at the time of filing the written statement even after issuance of notice to produce the Will was given by the plaintiff. This Will was produced only at the time of examination of the first defendant. This Will is not mentioned in Exhibit A6 executed by defendants and their mother. The Will was sent for expert's opinion at the instance of plaintiffs. PW2, the hand writing expert has clearly stated that the signatures in Exhibit B1 Will do not tally with the admitted signatures of Kullappa Naicker. These are suspicious circumstances surrounding the execution of Exhibit B1 Will. DW2 and 3 are the close relatives of the defendants and they are inimical towards plaintiff. Therefore, they are giving false evidence against the plaintiff and supporting the defendants. After the disposal of the First appeal, D2 and D3 had accepted the First Appellate Court's judgment and they have not preferred any appeal. Rather they admitted the findings, especially the findings with regard to the Exhibit B1 Will. Therefore, it is not open to challenge the judgment of the Courts below by the defendants 1 and 4. In this regard, the learned counsel for the respondents pressed into service, the judgment of the Hon'ble Supreme Court reported in (1975) 2 SCC 512 Janampally Narasimha Reddy Vs. M/s.A.S.Krishna & Company (Private) Limited and others. Therefore, the learned counsel for the respondents prayed for confirming the judgment of the Courts below and for dismissal of this Second Appeal.

13. In reply, the learned counsel for the appellants submitted that the defendants 2 and 3 purchased the share of the plaintiffs and therefore, they have not filed appeal. Exhibit A11 relates to a property assigned to Kullappa Naicker. He executed Will in respect of this properties in favour of his daughters through Exhibit A11 Will. Exhibit A6 also does not relate to the suit property. It relates to the property in survey No.602/5. Therefore, there is no mention about Exhibit B1 Will in Exhibit A6.



14. Considered the rival submissions and perused the records.

15. From the pleadings and evidence available in this case, plaintiff/respondents 1 to 5 claimed that the suit properties are joint family properties of their father Thirunavukkarasu and uncle Nithyanandan. Therefore, their legal heirs are entitled to 50% of the share in the suit properties. On the other hand, defendants 1 to 4, now appellants 1 and 2 claim that the suit properties were the absolute properties of the Kullappa Naicker and he executed Exhibit B1 Will in respect of the suit properties in favor of their father Nithyanandan. The Will had come into force after the death of Kullappa Naicker and they are in possession and enjoyment of the suit properties.

16. Whether the suit properties are joint family properties or absolute properties of Kullappa Naicker, it is no doubt that Thirunavukkarasu and Nithyanandan are each entitled to 50% share in the suit properties. After their death, their legal heirs are entitled for their respective shares. Defendants want to exclude the plaintiffs from inheriting the suit properties on the basis of Exhibit B1 Will. It is true that they have examined DW2 and DW3, attestors to the Will for proving the Will. They have also given evidence in support of execution of the Will. However, it is claimed by the plaintiffs that DW2 and DW3 are closely related to the defendants and inimical towards plaintiff and therefore, they are giving evidence in support of the defendants. When there is a scientific evidence available in the form of Exhibits X1 and X2 report and oral evidence of PW2 who gave evidence that signatures found in Exhibit B1 Will are not the signatures of Kullappa Naicker, the scientific evidence has to be preferred than the interested testimony of DW2 and DW3. Though the Courts below have not given specific finding with regard to the acceptability or non-acceptability of evidence of DW2 and DW3, both the Courts have considered the evidence available on record and believed the evidence of PW2, in coming to their conclusion. Therefore, mainly because there is no specific findings given by the Courts below, with regard to the evidence of DW2 and DW3, we cannot come to the conclusion that both the Courts below have not considered their evidence.

17. As rightly pointed out by the learned counsel for the respondents there are certain suspicious circumstances surrounding the execution of Will. It is for the appellants/defendants, who placed their claim on the basis of Exhibit B1 Will to dispel this suspicious circumstances. One of



the suspicious circumstances is that, though appellants have mentioned about the execution of Exhibit B1 Will in the written statement, the Will was not produced at the time of filing of the written statement. The plaintiffs had given notice to produce the Will. Even after the issuance of notice to produce the Will, the defendants have not produced the Will. The Will was produced only at the time of examination of the first defendant. Why the defendants were apprehensive of producing the Will along with the written statement. There is no explanation. The next suspicious circumstance is that Exhibit A11 Will was executed by Kullappa Naicer on 19.03.1980. If really, he wanted to bequeath his property in favour of the defendants, he could have bequeathed the suit properties in favour of the defendants under Exhibit A11 itself. He has not done it. It is not necessary to execute another Will in a short span of time.

18. Suspecting the genuineness of the Will, plaintiffs prayed the Court to send the disputed signatures in Exhibit B1 Will to be compared with admitted signatures in Exhibit A11 Will and other admitted signatures available in Sub-Registrars office. Accordingly, an Advocate Commissioner was appointed to take Exhibit A11 and Exhibit B1 along with admitted signatures from Sub-Registrars office and hand over to the hand writing expert. Hand writing expert, compared the disputed signatures with admitted signatures and came to the conclusion that the person who wrote the red enclosed signatures stamped and marked A1 to A4 did not write the red enclosed signatures similarly stamped and marked 'Q'. This report is marked as Exhibit X1 and the reasoning sheet for reaching the conclusion is marked as Exhibit X2. It is seen from the reasoning sheet that the questioned signature differs significantly from the standard in the handwriting characteristics. Characteristic differences include among other things the following,

- i) The skill of writing.
- ii) The alignment between the letters in the signature
"தா, குள்ளப்ப நாயகர்"
- iii) The location and manner of dots in the signature.
- iv) The relative sizing between the letters "த" & "ா".
- v) The manner of terminating the letters 'த', 'கு', 'ந', 'க'.
- vi) In the detailed designs such as the beginning and formation of making loops and curves in the letters 'த', 'ா', 'கு', 'ள', 'ப', 'ந', 'ய', 'க', 'ர்'.

19. Thus, PW2 and concluded that the signature in Exhibit B1 Will are not the signatures of Kullappa Naicker. On



the basis of PW2's evidence and Exhibits X1 and X2, and other suspicious circumstance surrounding the execution of the Will, both the Courts have concurrently found that plaintiffs have proved that Kullappa Naicker had not executed Exhibit B1 Will. When the Will is not proved, naturally, the legalheirs of Thirunavukkarasu and Nithyanandan are entitled to 50% of share each for their respective branches in the suit properties.

20. In a suit for partition, if one party wants to exclude other party from inheriting property, on the basis of possession, there must be a plea of ouster with specific details as to from when the other party was ousted from enjoying the suit properties. There is no such pleading in this case. Parties in this case are co-owners and one co-owner's possession is deemed to be the possession of other co-owners. Defendants cannot claim exclusive possession in respect of suit properties. Therefore, the plaintiffs have legal right to claim 50% of the share in the suit properties. That was rightly considered by the Courts below. This Court finds no reason to interfere with the findings of the Courts below.

21. With regard to the submission of the learned counsel for the respondent that when D2 and D3 accepted the judgment of the First Appellate Court, other defendants namely the appellants herein cannot file the Second appeal and the judgment relied for this proposition reported in (1975) 2 SCC 512, this Court is of the view that facts and circumstances of both the cases are different and therefore, the aforesaid judgment is not applicable to the facts of this case. In the reported judgment a suit for specific performance was filed. The agreement holder filed the suit against the defendant and his son. Both of them claimed that the suit property was the joint family property, since it was purchased from joint family funds. This contention was rejected and the High Court held that the suit property was self acquired property of the first defendant. The appeal before the Supreme Court was only filed by first defendant. The second defendant whose interest is affected by the decree has not preferred any appeal. In that situation, it was held that first defendant cannot file appeal, when the real person who should be aggrieved by the finding has not chosen to file an appeal. The factual situation in this case is totally different. The defendants have their independent claim. The claim is not based on other defendants claim. Therefore, as said earlier this judgment is not applicable to the facts and circumstances of this case.



22. In this view of the matter, this Court finds that Courts below are right in accepting the opinion of handwriting expert to come to the conclusion that the signature of Kullappa Naicker do not tally with his admitted signature for substantial question number one; the Courts below are right in referring the evidence of handwriting expert, than the interested evidence of DW2 and DW3, for substantial question of law number two; the Courts below are right in granting 50% share to the plaintiffs for the reason that the legalheirs of Parimelu Alagar and Alaganathan have not contested the suit and it confirms the case of the plaintiffs that they were already separated from the joint family for substantial question of law number three. Thus, the substantial questions of law are answered.

23. In the result, this Court confirms the judgment and decree of the learned Subordinate Judge, Tambaram, in A.S.No.18 of 2012 dated 30.01.2017 confirming the judgment and decree of the learned Additional District Munsif, Alandur, in O.S.No.144 of 1998 dated 01.02.2012 and dismisses the Second Appeal. No costs. Consequently, connected miscellaneous petition stands closed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

Ep

To

1. The Subordinate Judge,
Tambaram.

2. The Additional District Munsif,
Alandur.

3. The Section Officer,
VR Section,
High Court of Madras.

+1 CC to Mr.M.Muthappan, Advocate sr 7475

+1 CC to M/s. Sarvabhman Associates sr 7569

S.A.No.760 of 2021
and C.M.P.No.14776 of 2021

SSV(CO)
SP(04/03/2022)