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S.A.No. 888 of 2000

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 08.07.2022

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

S.A.No. 888 of 2000

A.Shanmugam ... 1st Plaintiff/1st Appellant/Appellant

Vs.

1. Pavunu Ammal ... 2nd Defendant/1st Respondent
 2. Muthu Manickam ... 3rd Defendant/2nd Respondent
 3. Dhanalakshmi ... 4th Defendant/3rd Respondent
 4. Amarvathi ... 5th Defendant/4th Respondent
 5. Kuppammal ... 2nd plaintiff/2nd appellant
- ... Respondents

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree dated 29.11.1999 made in A.S.No. 50 of 1992 on the file of the Court of the Subordinate Judge of Tindivanam and Judgment and Decree dated 19.03.1992 made in O.S.No. 947 of 1981 on the file of the District Munsif Court, Gingee.

For Appellant : Mr. R.Agilesh
for Mr. Maninarayanan

For 2nd Respondent : Mr.R.Murugesan



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For 3rd Respondent : No appearance

For RR 1, 4 & 5 : Died

JUDGMENT

The first plaintiff in O.S.No. 947 of 1981 on the file of the District Munsif Court, Gingee is the appellant herein. There were two plaintiffs in the suit. They were the appellant herein and his mother Kuppammal, who is now shown as the fifth respondent in the Appeal. Kuppammal is the second wife of one Annamalai Gounder. He had already married one Dhanabakkiya Ammal and had two daughters, namely, Mangalalakshmi and Jeyalakshmi. They are not parties to the present Second Appeal or to O.S.No. 947 of 1981.

2. The said suit in O.S.No. 947 of 1981 had been filed by the two plaintiffs seeking declaration of title and injunction with respect to vacant land situated at Mukkulam Village, Gingee in Villupuram District in Nanjai S.No. 53/2, totally measuring 2.90 acres out of which 0.95 acres and 0.50 acres also claimed under a Will executed by his father.



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3. Annamalai Gounder had two wives Dhanabakkiya Ammal and Kuppammal. The appellant is the son of Kuppammal. There were two other daughters, namely Mangalalakshmi and Jeyalakshmi, born through Dhanabakkiya Ammal.

4. The plaintiff filed O.S.No. 528 of 1978 before the District Munsif Court at Gingee seeking partition and separate possession of the total area of 2.90 acres in aforementioned survey number. The said suit had been filed against his father Annamalai Gounder.

5. Among the issues framed in that particular suit was that whether the plaintiff therein, who is the appellant herein was the legitimate son of Annamalai Gounder and whether he was entitled to partition and separate possession. After analysing the evidence adduced, the District Munsif held that the plaintiff is the legitimate son of the defendant Annamalai Gounder. He therefore granted the relief of partition of one half undivided share in the suit property which measured 2.90 acres. This would imply that the appellant herein / plaintiff in that particular suit was entitled to an undivided 1.45 acres.



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6. It is admitted by the learned counsel for the appellant that final decree application has not been filed.

7. Thereafter, after the death of Annamalai Gounder, his first wife Dhanabakkiya Ammal and her daughter Jeyalakshmi had sold on 29.10.1981 1.00 acre within the aforementioned 2.95 acres to Velu Gounder. The leagal representatives of Velu Gounder are the respondent Nos. 1 to 4 herein.

8. Claiming that Velu Gounder was interfering with possession and holding that the said sale deed was a cloud over their title, the two plaintiffs A.Shanmugam and Kupppammal filed O.S.No. 947 of 1981 before the District Munsif at Gingee. That suit was dismissed by Judgment dated 19.03.1992. During the trial in that particular suit, Ex.A-1, the copy of the plaint in O.S.No. 528 of 1978 was marked.



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9. The case of the plaintiffs in that particular suit was also that Annamalai Gounder had executed a registered Will on 03.12.1980 which was marked as Ex.A-2. If that will had been proved as provided under Section 68 of the Indian Evidence Act 1872, then the entire property would devolve on to the plaintiff. During the course of trial, the plaintiff examined himself as PW-1 and examined another witness Vedanta Gounder as PW-2. The defendant Velu Gounder examined himself as DW-1. Thereafter, further evidence appear to have been taken and the plaintiff also examined one more witness Varadhan and the wife of Velu Gounder, Pownammal was also examined and apart from three other witness.

10. On analysis of the evidence adduced, the trial Court came to a specific finding that the Will, produced as Ex.A-2 had not been proved in accordance with Section 68 of the Indian Evidence Act, 1872. It was also found that the defendant had purchased the property from Dhanabakkiya Ammal and Jeyalakshmi for valuable and adequate consideration and that they had a right at that particular time to convey the property and therefore held that the plaintiffs cannot seek declaration for the entire suit schedule property of 2.90 acres and therefore dismissed the suit.



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11. The plaintiffs then filed First Appeal in A.S.No. 50 of 1992 before the Sub Court at Tindivanam. The Judgment was delivered on 29.11.1999.

In the course of the said Judgment, once again the First Appellate Court held that the Will had not been proved in the manner known to law and further observed that the sale deed in favour of Velu Gounder dated 29.10.1981 is a valid and binding document and also observed that the boundaries had also been given in the said sale deed. It must be mentioned that the sale deed had been produced as Ex.B-1, during the course of trial. The Sale deed had been upheld by the First Appellate Court. The Appeal suit was also dismissed confirming the dismissal of the Original Suit.

12. Questioning such dismissal, the first plaintiff alone has filed the present Second Appeal.

13. The Second Appeal had been admitted on the following substantial questions of law:-



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“1. Whether the Courts below is legally right in rejecting the claim of the appellant on the ground that the Will was not proved, since they failed to note, even otherwise as a son, the appellant is entitled to the property of his father?;

2. Can a purchaser even assuming that such a purchase is true and valid from a co-owner claim possession and disturbed possession of other owners and is not the remedy of such purchaser sue for partition to work out his remedies?; and

3. Whether the Courts below is legally right in rejecting the claim of the plaintiff, when they failed to note even an illegitimate son would be entitled for his father's property?”

14. The first substantial question of law surrounds the proof of the Will.

Section 68 of the Evidence Act is as follows:-

“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence



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until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.] ”

15. It is very clear that if a document requires attestation then the party who seeks to prove such document must prove execution and the execution must be proved by examining the attesting witnesses. If the attesting witnesses are not available then after going through the process under Order 16 Rule 10 of the Code of Civil Procedure, the procedure under Section 69 of the Evidence Act could be resorted to. If the attesting witness are dead, then some person who can identify the signature can be examined to prove the document. But the basic fact is that the Will must be proved in manner known to law. If a Will is produced then the burden is on the propounder of the Will to prove the Will.



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16. In the instant case, both the Courts have found that the Will Ex.A-2 had not been proved in the manner known to law. That being a finding on fact the same cannot be interfered by me.

17. However, it is stated that even if the Will is not taken into consideration, on the death of Annamalai Gounder, the plaintiff would have been entitled to the entire property. But it must be mentioned that Annamalai Gounder was entitled only to an undivided one half share in the property which would indicate he was entitled to 1.45 acres. That would have been divided among the plaintiff A.Shanmugam, the first wife Dhanabakkiya Ammal and her daughters Mangalalakshmi and Jeyalakshmi. Velu Gounder had purchased 1 acre from Dhanabakkiya Ammal and Mangal Lakshmi and that sale deed had been upheld by the First Appellate Court. Again that being a question of fact, this Court cannot interfered with the same.

18. With respect to the first substantial question of law, I hold that if the Will had been produced then a duty is cast to prove the Will. The Will had



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not been proved in manner known to law. The appellant will not be entitled to the entire property but only to on share of his father along with Dhanabakkiyammal and the children born through her.

19. The second substantial question of law is whether the purchaser from a co-owner can claim possession and whether the remedy of such purchaser is to sue for partition.

20. It must be mentioned that in O.S.No. 528 of 1978, the right of the vendors of the Velu Gounder, namely, Dhanabakkiya Ammal and her daughters to a share of the property had been recognised. A second suit for partition therefore need not be filed. In the earlier suit for partition namely, O.S.No. 528 of 1978, a final decree application will have to be filed. The purchaser has stepped into the shoes of the co-sharers and by getting leave of the Court, Vleu Gounder can also file an application seeking final decree and seek allotment of the property purchased by him, namely, one acre which has four separate boundaries. The plaintiff can also file an application for final decree.



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21. If at all the issue of limitation is put up against either one, it is for them to properly explain the delay before the Trial Court. Therefore, I would hold that in the facts of this case since the suit for partition had already been filed, the legal representatives of the Velu Gounder need not file a suit for partition, but after obtaining necessary leave, if the law of limitation provides, file an application for final decree. Similarly the appellant herein can also file an application for final decree. In such final decree application, the property purchased by the Velu Gounder, can be demarcated and delivered by equity to the legal heirs of Velu Gounder. In any final decree application on demarking of properties by metes and bounds the issue of possession then follows and the lands are so divided, they are entitled to be put in possession.

22. The third substantial question of law is whether the Courts were right in rejecting the claim of the plaintiff even though an illegitimate son would be entitled to his father's property. The share of the plaintiff had not been rejected. The trial Court had given a clear finding that he was born to Annamalai Gounder. Since that is an issue on fact, I hold that the Courts have not rejected the claim of the plaintiff. They have actually granted



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him a share and therefore the substantial question of law pales into insignificance.

23. Granting liberty to either the appellant herein or to the first to fourth respondents herein to file necessary application in manner known to law for final decree and seek to divide the property into metes and bounds and to be put in possession, since no other issue arises for consideration in the Second Appeal, the Appeal Stands dismissed.

24. The Second Appeal is dismissed. No order as to costs.

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Index :Yes/No

Internet:Yes/No

vsg

To

1. District Munsif Court, Gingee.
2. Sub-Court, Tindivanam.



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C.V.KARTHIKEYAN, J.

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